Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LAVERNE BELK,

Respondent

v.

CITY OF ELDON, MISSOURI
RON BLY, STEVE WOOD, BRAD VEATCH, AND
SCOTT HARRISON,

Petitioners.

On Petition for Writ of Certiorari to the United State Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court held that in reviewing First Amendment retaliatory discharge claims, the balancing of interests test announced in *Pickering v. Board of Education*, 391 U.S. 563 (1968) must be applied to determine whether an employee's expression is protected by the Constitution. In deciding the present case, the Eighth Circuit did not apply the *Pickering* balancing test because it found "that the defendants failed to demonstrate sufficient evidence of workplace disruption to bring the *Pickering* factors into play." The questions which petitioners present to the Court on this issue are these:

1) Whether a government employer must meet a threshold burden of demonstrating that an employee's conduct caused actual workplace disruption before the reviewing court considers whether the *Pickering* factors justified the employer's corrective action?

2) Whether all issues of fact applicable to the *Pickering* analysis of a given case must be submitted to the jury?

3) Whether the defense of qualified official immunity can be decided against an individual defendant, in a First Amendment retaliation case, without applying the *Pickering* analysis to determine if that individual defendant had objectively reasonable grounds for making the employment decision under review?

LIST OF ALL PARTIES TO THE UNDERLYING PROCEEDING

All parties to the underlying proceeding are listed in the caption.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Belk v. City of Eldon*, 228 F.3d 872 (8th Cir. 2000). It is reproduced at A. 1a.[1]

The District Court's judgment, and its order denying the petitioner's post-trial renewed motion for judgment as a matter of law, are not reported. These two documents are reproduced at A. 17a and 40a, respectively.

STATEMENT OF JURISDICTION

The underlying judgment in favor of the plaintiff, Laverne Belk, was entered by the United States District Court for the Western District of Missouri, the Honorable Nanette K. Laughrey, presiding, on November 25, 1998. The district court entered its order denying the defendants' renewed motion for judgment as a matter of law on September 21, 1999.

The Eighth Circuit affirmed the judgment of the District Court on October 2, 2000, and entered its order denying the appellants' motion for rehearing on November 21, 2000.

This Court has jurisdiction to review the Eighth Circuit's decision under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS OF THE CONSTITUTION AND STATUTES

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

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[1] Citation to "A" references the appendix located at the end of this Petition. For convenience, all page citations to the decision under review refer to the copy reproduced in the appendix, not to the pages of the reported opinion.

> right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 42, U.S.C. § 1983, as amended:

> Every person who, under of color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Mo. Rev. Stat. § 79.320 (1986):

> The board of aldermen shall elect a clerk for such board, to be known as "the city clerk", whose duties and term of office shall be fixed by ordinance. Among other things, the city clerk shall keep a journal of the proceedings of the board of aldermen. He shall safely and properly keep all the records and papers belonging to the city which may be entrusted to his care; he shall be the general accountant of the city; he is hereby empowered to administer official oaths and oaths to persons certifying to demands or claims against the city.

STATEMENT OF THE CASE

Laverne Belk brought her federal claims in the District Court under 42 U.S.C. § 1983, as amended. She alleged that the defendants fired her for exercising rights of expression and association protected by the First Amendment to the United States Constitution. The district court had jurisdiction to decide these issues of federal law under 28 U.S.C. § 1331.

The petitioners ask the Court to grant certiorari to review whether the Eighth Circuit decided this First Amendment retaliation case contrary to *Connick v. Myers*, 461 U.S. 138 (1983), by failing to apply the balancing of interests test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968); and whether in denying the individual defendants qualified official immunity, the Eighth Circuit's decision is contrary to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The underlying facts, as discussed by the District Court and the Court of Appeals

At trial, the District Court submitted a verdict directing instruction requiring the jury to find that two separate events motivated the Eldon Board of Aldermen to terminate Laverne Belk from employment in two different jobs she held with the City of Eldon. Before the Board took any action, Belk was Eldon's City Clerk, and she was assistant to the City Administrator.

The District Court's instruction required the jury to find that "plaintiff's statements to Harold Dolby in October 1995 *and* attendance at meetings of the Eldon Concerned Citizens were motivating factors in defendants' decisions." A. 46a (emphasis added). The jury found the issues for Belk, and the District Court entered judgment on the verdict accordingly.

In its order denying defendants' renewed motion for judgment as a matter of law, the District Court summarized the events leading to Belk's firing, and to the Board's related decision against renewing the contract of its City Administrator, James Link. The District Court said:

> The main theory of Belk's First Amendment retaliation claim was that she was fired by the City of Eldon because she spoke with Alderman Dolby in October 1995. In that conversation, she reported that the City Administrator, Jim Link, was having an affair with a city employee and he was paying the employee benefits to

which she was not entitled. Viewing the evidence in the light most favorable to Belk, she proved that her private conversation with Dolby was reported to the city attorney who, in turn, told Jim Link. Other Aldermen were also told about the accusation. The response of the Board was to authorize Link to reorganize the department and to terminate anyone except an elected city official.

At the time, Belk held two positions with the city. She was the assistant city administrator and the city clerk. Her position as city clerk was an elected position and she had been reelected by the Board of Aldermen each April for the last 14 years. Link was, therefore, not able to terminate Belk so long as she was city clerk. Instead, Link removed her title of assistant city administrator, eliminated her supervisory duties, demeaned her publicly, wrote false performance reports and then, five months later, requested the Board of Aldermen to replace Belk as city clerk, and the Board complied. (Footnote omitted, see A.18a).

On the same day that Belk was not reelected as clerk, Link gave Belk notice that the city was contemplating serious disciplinary action against her which could result in her termination. After Belk challenged Link's disciplinary allegations, Link concluded that the Board of Aldermen should decide her fate, not him. The Board then hired an outside consultant, Ivan Schrader, to investigate the conflict between Belk and Link. Schraeder recommended that Belk and Link both be fired. At first, the Board rejected the recommendation and voted to fire Belk but not Link. Then, in an effort to get a unanimous vote, the Board decided to fire Belk immediately and not renew Link's contract, which was set to expire approximately four months later. Link, however, could continue thereafter on a month-to-month basis.

> After Plaintiff was not reappointed as city clerk, she attended some meetings of a group named Concerned Citizens of Eldon. Prior to terminating her, some City Aldermen had told her that her presence at the meetings was inappropriate, given her position with the city.

A. 17a-19a.

In its decision, the Eighth Circuit amplified on two facts discussed by the District Court, stating:

> By all accounts, Belk and Link worked together without incident until Debra Carpenter was hired by the city in 1995. Tensions arose between Carpenter and other city employees under Belk's supervision, and rumors began to circulate that Carpenter and Link were having an extramarital affair.
>
> * * * * *
>
> Faced with the same turmoil in the city administration that led to Belk's termination, the board hired an attorney to act as an independent investigator to evaluate the rumors about Link and Carpenter and the rift in the city's administrative staff and to recommend a solution. The investigator recommended that both Belk and Link be terminated.

A. 2a-3a.

The Eighth Circuit's opinion under review

The Eighth Circuit's decision affirmed the District Court's order in all respects. For purposes of reviewing this Petition, the most important part of the Eighth Circuit's opinion relates to its holding that the *Pickering* analysis was inapplicable to the Board's underlying employment decisions.

The Eighth Circuit ruled that the *Pickering* balancing of interests test did not apply to the present case because the defendants failed to establish that Belk's speech "disrupted the workplace." A. 11a. In pertinent part, the Eighth Circuit held:

> In cases where the public employer cannot demonstrate that the employee's speech disrupted the workplace, however, the court need not proceed to a specific *Pickering* factor analysis absent exceptional circumstances.
>
> * * * * *
>
> Where there is no evidence of disruption, resort to the *Pickering* factors is unnecessary because there are no government interests in efficiency to weigh against First Amendment Interests.

A. 11a.

Next, the Eighth Circuit ruled that the District Court correctly refused the defendants' request to give special interrogatories to the jury on certain *Pickering* factors. In pertinent part, the special interrogatories, which the District Court refused to give, were these:

1) whether "personal loyalty, and confidence of superiors are necessary for one to perform the duties of plaintiff's job";

2) whether Belk's conduct "had a detrimental impact on working relationships between plaintiff and superiors"; and

3) whether Belk was "insubordinate toward her superiors, or engaged in acts which undermined the authority of her superiors."

A. 50a-51a.

In addressing the District Court's refusal to give these interrogatories at the defendants' request, the Court of Appeals said:

> We conclude that the defendants failed to demonstrate sufficient evidence of workplace disruption to bring the *Pickering* factors into play and that the jury charge, as given, fairly and accurately stated the law to the jury.

> Moreover, the jury's specific finding that Belk's speech posed no impediment to the functioning of the city administration obviated the need for interrogatories incorporating the *Pickering* factors.

A. 13a.

In a footnote, the Court of Appeals ruled that Belk's activities with Eldon Concerned Citizens were immaterial to the *Pickering* analysis, even though the jury found that Belk was discharged for attending the group's meetings.

The Court said:

> Our findings upholding Belk's retaliatory discharge claim based on her conversation with Dolby are alone sufficient to require us to affirm the decision of the district court. We therefore decline to address the additional constitutional issues raised by Belk's freedom of association claim.

A. 4a, n. 2.

The Eighth Circuit also held that the individual defendants had no official immunity because they failed to established adequate evidence of workplace disruption to justify firing Belk for speaking to Dolby, stating:

> The crux of the defendants' argument is that, because the evaluation of Belk's claim implicates *Pickering*, they are automatically entitled to qualified immunity. Although we have held that public employers are not required to anticipate the outcome of the delicate *Pickering* balancing, that reasoning applies only to cases where the employer has made some showing of impediment to its efficient functioning. Where, as here, the employer has failed to demonstrate any disruption, there is no balancing to be done and the evidentiary failure is fatal to the claim of qualified immunity.

A. 14a (citations omitted).

Lastly, the Court of Appeals held that advice of counsel did not entitle the individual defendants to qualified immunity because their attorney testified that he was unaware of Belk's statements to Dolby. "The board therefore could not reasonably have relied on his assurances that discharging Belk would not constitute a violation of her First Amendment rights," said the Court. A. 14a.

Additional factual background

1. *Belk's duties in the two jobs she held with the City of Eldon*

Belk was not a resident of Eldon. A. 64a. Her relationship to the City was exclusively through employment.

By statute, Mo. Rev. Stat., § 79.320 (1986), the Board of Aldermen elects its own clerk. The clerk's tenure is set by ordinance. Eldon elects its clerk in April of each year, to a one-year term. In the position of clerk, Belk was the City's chief fiscal officer and records custodian. She attended all of the Board's meetings, including executive sessions, and prepared the minutes. A. 68a-69a.

In her job as Link's assistant, Belk considered herself to be "department head over the administration department." A. 68a. She even attended meetings for Link's A. 70a, and handled personnel matters when he was unavailable. Belk administered payroll and managed a staff of seven to eight workers. A. 68a-69a.

2. *The content and context of Belk's meeting with Alderman Dolby*

As the Eighth Circuit noted, tensions within Eldon's administrative offices had produced a rift among staff members. A. 2a-3a. During the conflict between Belk and Link, rumors started about Carpenter and Link having an affair. A. 2a-3a. In this same time period, an employee supervised by Belk, Rosie Willis, started searching

Carpenter's desk. A. 59a-63a. Willis found unsigned love notes, which she copied and gave to Belk. A. 60a, 62a. Belk kept the copies Willis gave her, and did not chastise Willis for what she had done. A. 62a-63a.

According to Belk, four or five months after Carpenter was hired (which was in January, 1995), Belk discovered that Carpenter was receiving health insurance from the City. This would have placed Belk's discovery in about May or June, 1995. Belk believed this to be improper because Belk thought Carpenter was a "temporary" employee who was not eligible for insurance. A. 71a.

Belk never asked Link about Carpenter's benefits, nor did she ever tell him about the rumors of his affair with Carpenter. A. 57a. At trial, Belk acknowledged that Carpenter was not classified as a temporary employee. A. 65a-67a. Carpenter was a permanent employee from the date of her hiring. A. 65a-66a. Belk offered no documents or other evidence indicating that Carpenter was ineligible for insurance at the time Carpenter started getting these benefits[2].

It was not in dispute that in October of 1995, Belk told Dolby about the rumors of Link's alleged marital misconduct. Belk admitted telling Dolby that "it was a joke on the business district that the City had hired [Link] a girlfriend." A. 71a.

The Eighth Circuit described Belk's allegations about the affair with Carpenter as perhaps having "been in poor taste," but that "they were nonetheless part of Belk's protected speech, because they provided a potential explanation for Link's alleged misuse of public funds." A. 8a.

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[2] Dolby, who was no longer an Alderman by the date of trial, remembered nothing about discussing insurance benefits with Belk in October of 1995. He only recalled Belk telling him things with "sexual overtones." A. 58a.

3. *Belk's association with Eldon Concerned Citizens*

The Eighth Circuit concluded that Belk's meeting with Dolby was protected by the First Amendment, and that the judgment for Belk should stand for that reason alone.

The jury's verdict represents a finding that Belk's meeting with the citizens' committee was a motivating factor in her firing. Belk's role in Eldon Concerned Citizens bears on the issue of whether the Aldermen had constitutionally permissible grounds for discharging Belk, regardless of whether or not the Eighth Circuit correctly held that Belk's statements to Dolby were protected by the First Amendment.

Eldon Concerned Citizens formed after the Aldermen elected Betty Rayhart to replace Belk as city clerk, in April 1996. A. 67a. At the time Belk first met with the committee, Belk knew that one of the committee's goals was "removal of Mr. Link as City Administrator." A. 55a-56a. In addition to meeting, the committee did some public things like picketing city hall. A. 56a. Belk did not actually picket, but she gave the committee "direction as they asked for it on how to form a committee" and she answered questions about parliamentary procedure. A. 56a.

4. *The City's investigation of the problems between Belk and Link*

While Eldon Concerned Citizens remained active, the City hired outside legal counsel, Ivan Schraeder, to "evaluate the rumors about Link and Carpenter and the rift in the city's administrative staff and to recommend a solution." A. 3a. After investigating, Schraeder discussed the litigation consequences of terminating either Belk or Link. He advised the aldermen that they were free to remove Belk, but that Link's contract posed a liability issue. A. 64a. Then, Schraeder recommended removing both Belk and Link, stating:

> My investigation showed that the—literally the City employees had divided up sides and were supporting one

> position or the other. It was my view, after the investigation, that whichever side succeeded if they were still there, that the problems that existed in the City would interfere with and continue to expand to interfere with City's work and it was not a good situation for the City to be involved in.

A. 64a-65a.

Schraeder prepared a detailed report of his findings and recommendations. The Aldermen had the report available while they were deliberating on what to do about the problems created by Belk and Link.

At trial, Belk admitted that in making the decision to terminate her, the Aldermen were "strictly dealing with a conflict between [her] and Mr. Link." A. 54a. She had no reason for believing that any of the Aldermen had personal animosity toward her. A. 54a.

REASONS FOR GRANTING CERTIORARI

The primary reason for granting certiorari is determine whether the Eighth Circuit's decision conflicts with *Connick v. Myers*, 461 U.S. 138 (1983). The petitioners submit that Eighth Circuit's decision conflicts with *Connick* by requiring a governmental body to make a threshold showing that an employee's activities have actually disrupted the workplace, before considering all other factors that bear on the reasonableness of the employer's decision under review. Moreover, the *Belk* decision is but the most recent in a line of Eighth Circuit cases which reflect this same conflicting interpretation of *Connick*.

Certiorari is the appropriate means by which to address apparent conflicts between a decision of this Court and a decision from any of the courts of appeals. *United States v. Doe*, 465 U.S. 605, 610 (1984).

How the decision under review conflicts with *Connick*

In *Connick*, the Court confronted a situation in which a government employee had circulated a petition about office policy within the workplace. After concluding that part of the petition touched on a matter of public concern, the Court held that the employer, Connick, was justified in terminating Myers because he "reasonably believed [Myers' conduct] would disrupt the office, undermine his authority, and destroy close working relationships." *Id.*, at 154.

In overruling Connick's motion for summary judgment, the District Court incorrectly held that Connick had the burden to "clearly demonstrate" that "the speech involved 'substantially interfered' with official responsibilities," because Myers' questionnaire had not "impeded Myers' ability to perform her responsibilities." *Id.*, at 151.

Even though there was no evidence of actual dysfunction within Connick's office, on review this Court held that Connick's decision to terminate Myers was entitled to deference because his concerns with the potential for workplace disruption were objectively reasonable under the *Pickering* analysis. *Id.*, at 151-52. The Court construed *Pickering* to mean that the employer's "burden in justifying a particular discharge varies depending upon the nature of the employee's expression," and that "[t]he *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.*, at 150.

Two factors that can weigh heavily in the *Pickering* analysis are the importance of "close working relationships" and the reasonableness of an employer's belief that an employee's actions undermine supervisory authority and "destroy close working relationships." *Connick*, 461 U.S. at 151, 154.

Thus, although the degree of legitimate public concern in an employee's speech may curb an employer's discretion in dealing with resulting problems, the employer is not required to defer taking action until chaos finally breaks loose. The Court said "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relations is manifest before taking action." *Id.*, at 152.

The Eighth Circuit departs from *Connick* in holding that the *Pickering* analysis is altogether inapplicable unless the government employer first demonstrates actual workplace disruption tied to the employee's expression. In *Belk*, the Eighth Circuit held that the *Pickering* analysis was unnecessary because of a finding that Belk's conduct had not yet impeded the City's operations, stating that: "Where there is no evidence of disruption, resort to the *Pickering* factors is unnecessary because there are no government interests in efficiency to weigh against the First Amendment interests." A. 11a.

This dispositive part of the Eighth Circuit's decision is directly contrary to *Connick*, and *Waters v. Churchill*, 511 U.S. 661, 673 (1994), in which the Court recognized that it has historically "given substantial weight to government predictions of disruption, even when the speech involved is on a matter of public concern." Thus, by failing to apply *Pickering*—and thereby failing to address the importance of close working relationships in Eldon city government, and the impact of Belk's many divisive activities upon working relationships—the opinion imposes an evidentiary standard which was rejected in *Connick* and *Waters*.

An entire line of Eighth Circuit opinions also conflicts with *Connick* in the same manner as the decision under review

The *Belk* decision should be reviewed because it is but the latest in an established line of Eighth Circuit opinions directly conflicting with *Connick*. This line of cases may be traced to its 1990 beginnings in *Powell v. Basham*, 921 F.2d 165, 168 (8th Cir. 1990)(affirming denial of summary judgment because the "[d]efendants have not yet produced any evidence to show that Powell's criticisms adversely effected the efficiency of the department."). This language from *Powell* has taken root within the caselaw of the Eighth Circuit, and has proliferated. See also, *Grantham v. Trickey*, 21 F.3d 289, 294 (8th Cir. 1994)(in which the Court said, "it is critical to determine whether the defendants have put the *Pickering* balancing test at issue by producing evidence that the speech activity had an adverse effect on the efficiency of the public employer's operations."), *Burnham v. Ianni*, 119 F.3d 668, 678-79 (8th Cir. 1997), *Sexton v. Martin*, 210 F.3d 905, 911-12 (8th Cir. 2000)("Before the Court commences the *Pickering* balancing test, however, it is critical to determine whether the defendant has produced sufficient evidence that the speech had an adverse effect on the efficiency of the employer's operations).

None of the other federal courts of appeals have adopted the Eighth Circuit's limiting construction of *Connick*. Left uncorrected this misapplication of *Connick* is sure to continue within the Eighth Circuit, and may infect the caselaw of the other circuits.

The impact of misapplying *Connick*

The Court need look no further than the present case to examine the mischief that results when the *Pickering* balancing test is not applied according to *Connick*. The first serious problem was an error in jury instruction.

1. *The Eighth Circuit incorrectly upheld the District Court's decision refusing to submit special interrogatories on issues of fact relevant to the Pickering balancing test.*

The petitioners do not here challenge the District Court's broad discretion in submitting jury instructions. However, in this instance the District Court selectively submitted some questions of fact applicable to the *Pickering* analysis, but declined to submit others.

The District Court submitted interrogatories asking the jury to find whether Belk's actions "impeded the City of Eldon's government function?" A. 44a. The jury answered in the negative, finding that Belk's actions had not actually impeded "government function." A. 44a. But that finding addresses only one of the many *Pickering* factors applicable to this case.

The Eighth Circuit held that "the district court cannot be said to have abused its discretion by submitting the threshold inquiry, rather than the specific *Pickering* factors to the jury." A. 12a. Here again, the Eighth Circuit's decision reflects that Court's misconstruction of *Connick*. The *Belk* decision reaffirms Eighth Circuit precedent which predicates even considering the government's interests, under *Pickering*, upon a showing of actual workplace disruption. *Connick* does not require proof of actual work place disruption as a pre-condition which must be met prior to examining all of the factors relevant to a *Pickering* analysis of an employment decision.

Certainly the City was justified in placing importance on close working relationships between Belk and the Board which elected her, and between Belk and the City Administrator with whom she worked directly on a daily basis.

Belk held two highly sensitive positions within the City of Eldon. She was the Board's elected clerk, with access to the

City's most confidential documents and meetings. Within the City's administration, Belk worked directly for the man, Link, whom she accused of marital misconduct, and of unsubstantiated financial misfeasance. After making those accusations, Belk took part in organizing a group of citizens who were forming to agitate for Link's firing. According to the findings of the investigator whom the City hired to sort blame for all of this, both Belk and Link were forcing other employees to take up sides in the dispute. Close working relations were falling apart.

Yet the District Court refused to instruct the jury to decide whether "personal loyalty, and confidence of superiors are necessary for one to perform the duties of plaintiff's job," or whether "plaintiff's conduct had a detrimental impact on working relationships between her and superiors." A. 50a. However, these two factors are important to deciding whether Belk's expression and association were protected. A finding for the defendants on these issues of fact would have required giving "a wide degree of deference to the employer's judgment" on how to resolve the situation. *Connick*, 461 U.S. at 151-52.

The petitioners are mindful that deciding whether speech is protected presents a question of law. *Connick*, 461 U.S. at 148, n. 7. However, the factual components of the *Pickering* test have consistently been treated within the Eighth Circuit as issues of fact for decision by the jury. See, *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993).

This Court has not yet ruled on whether the issues of fact pertaining to the *Pickering* analysis are to be decided by the court or the jury. The Court touched on this question in *Waters v. Churchill*, 511 U.S. 661, 676 (1994). There, the Court suggested that the jury is to decide questions of fact relevant to the *Pickering* analysis. *Id.* If some of the factors relevant to the *Pickering* analysis are to be submitted to the

jury, then in fairness all relevant issues of fact should be submitted.

If the *Belk* decision is permitted to stand uncorrected, trial courts throughout the federal system will have authority for submitting only a single *Pickering* question to the jury, namely: "was there any actual disruption in the workplace?" That is essentially the question which the District Court submitted, in Belk's trial, to the exclusion of all other relevant *Pickering* issues of fact. If a future jury finds no actual disruption of operations, as the jury did in *Belk*, then the Eighth Circuit's decision now holds that the inquiry is over and the plaintiff wins. That is not the intent of *Pickering*.

2. *By examining only the evidence which supported the conclusion that Belk's comments about employee benefits did not impede city government, the Eighth Circuit failed to consider the full context of the dispute which motivated the Board's decisions.*

The Eighth Circuit limited its review of the District Court's judgment to the question of whether Belk's October 1995 statements to Alderman Dolby were protected speech. The Eighth Circuit expressly declined to analyze the impact of Belk's activities with Eldon Concerned Citizens—activities which aided a group trying to get Link fired. A. 4a, n.2.

The jury found that Belk's activities with the committee motivated her firing in May of 1996. Thus, analyzing Belk's freedom of association claim is critical to correctly evaluating the events surrounding the Board's decisions to remove Belk and Link from the City's government.[3]

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[3] Belk's freedom of association claim is analogous to those cases addressing decisions based upon political affiliation. These hold that employees with broad responsibilities—policymakers—may lawfully be held to higher standards of loyalty than other workers, *Eldrod v. Burns*, 427 U.S. 347, 368 (1976), and that an employer's discretion is governed by whether "party affiliation is an appropriate requirement for the

In failing to consider the significance of Belk's activities with Eldon Concerned Citizens, the petitioners believe that the *Belk* decision conflicts with not only *Connick*, but also with *Waters v. Churchill*, 511 U.S. 661, 679-80 (1994), which holds that an employer may take corrective action based upon its reasonable beliefs about the content, and potential impact, of an employee's alleged acts of expression. *Waters*, at 681, also holds that an "employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements."

Waters presented a similar situation to that addressed in Belk's case. Churchill was discharged for making a series of statements critical of management's administration of a hospital. *Id.*, at 665-66. There was some dispute about what Churchill said. Management investigated; talking to Churchill, and to witnesses who overheard Churchill's comments. *Id.* The Court did not attempt to decide whether some of the statements may have been on matters of public concern, and therefore entitled to some level of First Amendment protection. *Id.*, at 681-82.

In this case, Belk and Link lost their jobs for quarrelling. Belk's activities may have included the one statement that the Eighth Circuit found to be on a matter of public concern: Belk's statement about Debra Carpenter's health insurance benefits[4]. Belk neither substantiated this accusation, nor

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effective performance of the public office." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). None of these decisions suggest that an employee has a First Amendment right to openly aid a group which is trying to get her boss fired.

[4] The petitioners have intentionally declined to address whether giving Debra Carpenter's health insurance benefits implicates a matter of public concern, or whether this is just an internal personnel issue. This issue is not the basis on which the petitioners are seeking certiorari. But for a number of reasons which can be later briefed, the petitioners believe that this issue of internal personnel policy is not a matter of public concern.

limited her activities to addressing employee health insurance. The jury found that the totality of Belk's conversation with Alderman Dolby motivated her firing, as did her activities that aided with organizing Eldon Concerned Citizens. Thus, the Board's information about all of Belk's activities, including her association with a group trying to get Link fired, bear on the reasonableness of the Board's disciplinary action.

3. *The Eighth Circuit misconstrued this Court's decision, in Harlow v. Fitzgerald, by holding that unless the individual defendants first established that Belk's activities actually disrupted the workplace, the defendants were not entitled to qualified immunity.*

The Court of Appeals declined to rule that the individual aldermen had qualified immunity because "[w]here, as here, the employer has failed to demonstrate any disruption, there is no balancing to be done and the evidentiary failure is fatal to the claim of qualified immunity." A. 14a (citations omitted).

In *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982), the Court held that:

> . . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Stated a little differently, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).[5]

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[5] In deciding Harlow, the Court assumed that Fitzgerald would have prevailed on his underlying claim against Harlow but for qualified official immunity. See, *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998).

The Eighth Circuit adheres to a rule of construction which holds that when the fact intensive *Pickering* analysis is implicated, "the asserted First Amendment right can rarely be considered 'clearly established' for purposes of the *Harlow* qualified immunity standard." *Grantham*, 21 F.3d at 292. Thus, by declining to balance the respective interests of Belk and the Aldermen, the Eighth Circuit significantly restricted the individual defendants' ability to establish their right to qualified immunity.

In this case, it is far from obvious whether the Board of Aldermen should have reasonably known that Belk had a "clearly established right" to pursue a course of conduct which, in effect, was an attack on her boss. It is far from obvious that Belk's asserted right is clearly established at all.

Even though the City's investigating attorney testified that he did not know of Belk's statements to Dolby (which suggests that they were far less significant at the time of this dispute than they have become in the course of litigation), he gave the Board of Aldermen lawful reasons for terminating Belk and Link: the need for removing both of the people responsible for polarizing City Hall. A. 65a. Thus, the aldermen should have immunity, regardless of whether the Eighth Circuit has correctly applied *Connick* and *Pickering*.

Qualified immunity—for those individuals who must make employment decisions for governmental bodies—is a meaningless protection if it is available only to those officials who correctly anticipate the applicability and outcome of the *Pickering* balancing test in later litigation. The decision under review, if not brought into conformity with *Connick* and *Harlow*, will make that foresight all the more difficult.

CONCLUSION

The Court should grant certiorari for the reasons stated above. Petitioners suggest that upon review, the Court should

remand this case for retrial on issues relating to the importance of close working relationships in Laverne Belk's position, and on issues relating to the impact that Belk's conduct had upon her relations with superiors and coworkers. Furthermore, the case should be remanded with instructions that the lower Court consider the significance of Belk's activities with the group, Eldon Concerned Citizens, in light of the important positions of trust Belk occupied with the City of Eldon. Finally, on review, the decision of the Court of Appeals should be reversed on the issue of qualified official immunity, and judgment for the individual defendants should be entered accordingly.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-3911

LAVERNE BELK,

Appellee,

v.

CITY OF ELDON, SCOTT HARRISON,
STEVE WOOD, BRAD VEACH, RON BLY,

Appellants.

Appeal from the United States
District Court for the
Western District of Missouri

Submitted: June 16, 2000

Filed: October 2, 2000

Before WOLLMAN, Chief Judge, BEAM, and BYE, Circuit Judges.

WOLLMAN, Chief Judge.

Laverne Belk, formerly an employee of the city of Eldon, Missouri, filed suit against the city and Scott Harrison, Steve Wood, Brad Veach, and Ron Bly, four members of its Board of Aldermen, in their individual capacities (collectively, the defendants), claiming that her discharge was in retaliation for

the exercise of her First Amendment rights. The district court[1] entered judgment on the jury's verdict for the plaintiff and awarded damages, including front pay. The defendants appeal, contending that the district court should have granted their motions for judgment as a matter of law or, in the alternative, for a new trial, because Belk's speech was not protected and because the aldermen were entitled to qualified immunity. We affirm.

I.

Because the defendants appeal the district court's denial of their Rule 50(b) motion for judgment as a matter of law, we take all facts in the light most favorable to Belk. Belk was a long-time employee of the city of Eldon. In 1996, she held two positions with the city. She had held her annual appointment by the board as the city clerk since 1982. She was also, as an at-will employee, the assistant to the city administrator, James Link. In these positions, she performed a number of administrative, clerical, and supervisory duties, and reported directly to Link, who was employed by the city on a contractual basis.

By all accounts, Belk and Link worked together without incident until Debra Carpenter was hired by the city in 1995. Tensions arose between Carpenter and other city employees under Belk's supervision, and rumors began to circulate that Carpenter and Link were having an extramarital affair. In the course of her work, Belk saw a bill for health insurance that she believed showed that Carpenter was receiving benefits inappropriate to her employment status. Belk sent a memo to Link expressing her concerns, but was rebuffed.

In October of 1995, Belk spoke privately with Harold Dolby, then one of the members of the Eldon Board of Aldermen. She told him (1) that rumors were circulating

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[1] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

about Link and Carpenter, and (2) that she believed Carpenter was receiving benefits to which she was not entitled. In November of 1995, Link, acting with the acquiescence of the board, fired Belk from the position of assistant city administrator.

Until her conversation with Dolby, Belk had consistently received favorable job performance reports. Faced with the same turmoil in the city administration that led to Belk's termination, the board hired an attorney to act as an independent investigator to evaluate the rumors about Link and Carpenter and the rift in the city's administrative staff and to recommend a solution. The investigator recommended that both Belk and Link be terminated.

In April of 1996, at the end of Belk's term as city clerk, the board followed Link's recommendation and appointed Betty Rayhart as the new city clerk. In order to achieve a unanimous vote on Rayhart's appointment, the Board also voted not to renew Link's contract, effectively converting him to an at-will employee upon the expiration of the contract.

Belk filed suit in district court, alleging that the board discharged her in retaliation for the exercise of her First Amendment rights in speaking with Dolby and that she had been discriminated against on the basis of sex. The jury found for the defendants on the sex discrimination claim, but found for Belk on her retaliatory discharge claim.

II. First Amendment Claims

The defendants argue that the district court erred in denying their motions for post-verdict judgment as a matter of law under Federal Rule of Civil Procedure 50(b) or, in the alternative, for a new trial under Rule 59(a). They base their arguments on three alternative contentions: (1) that Belk's

speech[2] is not protected by the First Amendment because it did not address a matter of public concern; (2) that, even if it did address a matter of public concern, under the *Pickering* balancing test her speech is not protected because Belk's interests in her First Amendment rights were outweighed by the public interest in the smooth functioning of the city administration; and (3) that, even if Belk was improperly terminated, the members of the board were entitled to qualified immunity.[3] We reject all three contentions.

We review a district court's denial of a judgment as a matter of law de novo, applying the same standard as that employed by the district court. *See Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 689 (8th Cir. 1997). We resolve all doubts in favor of the non-moving party and give that party the benefit of all reasonable inferences. *See Brown v. United Missouri Bank*, 78 F.3d 382, 387 (8th Cir. 1996). "Judgment as a matter of law is appropriate only when all of the evidence points one way and is 'susceptible of no reasonable inference sustaining the position of the nonmoving party.'", *McKnight v. Johnson Controls*, 36 F.3d 1396, 1400 (8th Cir. 1994) (quoting *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992)). Post-verdict judgment as a matter of law is appropriate only where the evidence is entirely insufficient to

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[2] Our findings upholding Belk's retaliatory discharge claim based on her conversation with Dolby are alone sufficient to require us to affirm the decision of the district court. We therefore decline to address the additional constitutional issues raised by Belk's freedom of association claim.

[3] The defendants also argue that the district court should have granted their motion for judgment as a matter of law because there was insufficient evidence that Belk was terminated because of her speech. This contention was not raised in the defendants' pre-verdict motion, however, and thus we need not reach its merits. *See* Fed. R. Civ. P. 50(b) *cmt.* (1991) ("A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.").

support the verdict. *See Greaser v. State Dep't of Corrections*, 145 F.3d 979, 984 (8th Cir. 1998).

The denial of motion for a new trial under Fed. R. Civ. P. 59(a) is reviewed with great deference to the district court's ruling and will not be reversed in the absence of a clear abuse of discretion. *See McKnight*, 36 F.3d at 1400. "The key question is whether a new trial should have been granted to avoid a miscarriage of justice." *Id.*

Whether the First Amendment shields a public employee from discharge as a result of her speech requires a two-step judicial inquiry. *See Shands v. City of Kennett*, 993 F.2d 1337, 1341 (8th Cir. 1993). First, we determine whether the employee's speech can be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Meyers*, 461 U.S. 138, 146 (1983); *Shands*, 993 F.2d at 1342. Second, if the speech addresses a matter of public concern, we balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Shands*, 993 F.2d at 1342. Both inquiries are questions of law for the court to decide. *See Connick*, 461 U.S. at 148 n.7, 150 n.10; *Shands*, 993 F.2d at 1342. Any underlying factual disputes, however, are properly submitted to the jury through special interrogatories or special verdict forms. *See Shands*, 993 F.2d at 1342.

A. The *Connick* Analysis

Belk's comments are not entitled to First Amendment protection unless they addressed matters of public concern. *See Connick*, 461 U.S. at 146. Matters of public concern include matters of political, social, and other concern to the community. *See id.* at 147-48. In evaluating speech under the *Connick* framework, we examine the content, form, and

context of the speech as revealed by the entire record. *See id.; Shands*, 993 F.2d at 1343. The defendants argue that Belk's statements to Dolby did not address matters of public concern because (1) Belk's statements were not made in a public setting, (2) Belk herself was motivated by a desire to spread gossip and animosity toward Link, and (3) her statements were "purely job-related."

1. Content

"We generally have held that speech about the use of public funds touches upon a matter of public concern." *Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8th Cir. 1995). Allegations of the misuse of public funds relate directly to citizens' interests as taxpayers, and are generally considered to address matters of public concern despite their personal pecuniary ramifications. *See Kincade*, 64 F.3d at 396; *Casey v. City of Cabool*, 12 F.3d 799, 803 (8th Cir. 1993).

Speech that criticizes a public employer in his capacity as a public official also addresses matters of public concern. "Criticism, no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern." *Casey*, 12 F.3d at 802.; *see Barnard v. Jackson County*, 43 F.3d 1218, 1225 (8th Cir. 1995) (holding allegations of wrongdoing by public officials are on the highest order of First Amendment concern). Heightened public interest in a particular issue, while not dispositive, may also indicate that the issue is one of public concern. *See Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 644 (8th Cir.1983) (holding that media coverage and citizen activism " . . . are a good indication of the public's interest").

Not every statement made by a public employee about her job addresses a matter of public concern, however. "When a public employee's speech is purely job-related, that speech

will not be deemed a matter of public concern . . . . Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment." *Buazard v. Meredith*, 172 F.3 d 546, 548 (8th Cir. 1999). In *Tuttle v. Missouri Department of Agriculture*, for instance, we held that a grain inspector's conversation with his supervisor touching on recent worker cutbacks, employment policies, possible increases in salaries, promotions, and safety issues did not address matters of public concern because the employee was speaking solely as an employee. 172 F.3d 1025, 1034 (8th Cir. 1999). Statements that deal with personnel matters are not generally protected by the First Amendment, and statements of "purely academic interest" to the speaker will be given broader protection than those in which she has a personal interest. *See Shands*, 993 F.3d at 1343. The question before us, then, is whether Belk's statements, which were unquestionably related to her employment, addressed solely personnel matters or matters of public concern.

First, Belk's statements implicated her interests as a citizen-taxpayer by alleging the misuse of public funds. The jury specifically found that Belk told Dolby that she believed a city employee was receiving benefits to which she was not entitled. The clear implication of such a statement is that public funds were being misused. Unlike the plaintiff in *Tuttle*, Belk had no employment-based personal pecuniary interest in the subj subject matter of her comments; her interest was academic. Belk and Carpenter did not have the same employment status, nor do Carpenter's benefits appear to have had any link to Belk's. Thus, Belk had no interest in Carpenter's benefits beyond those of a citizen.

Second, Belk's conversation with Dolby addressed a matter of public concern because, at its base, it was a criticism of the city administrator's conduct as a public official, not as her supervisor. Belk found fault not with Link's office policies as

they affected her and her fellow employees, but with what she perceived as his misuse of his public position. Moreover, the fact that the issue was taken up by a concerned citizen's group indicates that there was public interest in the matter.

The defendants repeatedly point out that Belk's statements to Dolby included reports that rumors were circulating about Link's relationship with Carpenter. Although such statements may have been in poor taste, they were nonetheless part of Belk's protected speech, because they provided a potential explanation for Link's alleged misuse of public funds.

2. Form and Context

Even when the content of a public employee's speech addresses matters of public concern, the form and context of the speech are also relevant to our analysis. *See Shands*, 993 F.2d at 1343. The defendants charge that Belk's statements, taken in context, could not have addressed matters of public concern because they were made in the course of a private conversation with Dolby and because she had improper motives for making them.

Although the context of the speech must be considered, the fact that a plaintiff made statements in a private conversation about a public official toward whom she may have harbored personal animosity does not vitiate the status of statement as addressing a matter of public concern. *See Rankin v. McPherson*, 483 U.S. 378, 387 n.11 (1987). Private statements are particularly amenable to First Amendment protection when they are made to a public official in his official capacity. *See id.* at 3 87. "The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern." *Id.* Nor does the presence of unsavory personal motives eviscerate the protection, so long as the speech itself addresses matters of public concern. *See id.*

If it raises any inference, the private nature of Belk's conversation with Dolby suggests that her statements addressed matters of public concern. After coming across information that she believed revealed inappropriate compensation of a city employee, she approached an elected city official in private and passed on the information, identifying the portion that she knew to be a rumor. Although her conduct may not be so obvious an exercise of political speech as pamphleteering or soap-box speeches, it is considerably more so than, for instance, the offhand comment of the plaintiff in *Rankin* who, in the course of a private conversation with a coworker, stated that she hoped that the next attempt on the President's life ,would be successful.

The defendants also point to Belk's admitted difficulties with Link as evidence that her motivations were those of a town gossip rather than a concerned citizen. Taking the evidence in the light most favorable to Belk, as we must, we see no basis for the defendants' contention that Belk was motivated by a desire to spread gossip and rumors about Link. She told Dolby that reports of the affair were only rumors. She spoke to him in private, and asked him not to share her comments with others. Later, when she was presented with the more public forum at the meeting of the concerned citizen's group, she chose not to comment on Link's affair. Any prurient appeal that Belk's statements may have contained did not affect their underlying content, nor did it give Belk a personal interest in passing on the information that would diminish its First Amendment protection. Accordingly, we reject the defendants' contextual argument. In light of the jury's findings that Belk told Dolby of her concerns about Carpenter's benefits and that this conversation was a motivating factor in Belk's discharge, we proceed to the second portion of the *Connick* framework. *See Shands*, 993 F.2d at 1343.

B. The *Pickering* Analysis

Having determined that Belk spoke on a matter of public concern, we must next determine whether the actions of the board were improper. To do so, we balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. This highly fact-specific balancing "requires full consideration of the government's interest in effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. Government entities, in their capacities as employers, have wide discretion and control over personnel decisions, internal affairs, discipline, and office policy. *See Shands*, 993 F.2d at 1344 (citing *Connick*, 461 U.S. at 151; *Ex parte Curbs*, 106 U.S. 371, 373 (1882)).

Under the *Pickering* test, a number of interrelated factors are taken into account in balancing the competing interests of government-employer and citizen-employee. These factors include: (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties. *See Shands*, 993 F.2d at 1344 (quoting *Bowman v. Pulaski County Special Sch. Dist.*, 723 F.2d 640, 644 (8th Cir. 1983) (citing *Connick*, 461 U.S. at 151-54)). Although the balancing of interests is a matter of law for the district court, the underlying factual questions should be submitted to the jury, generally through interrogatories or a special verdict form. *See Shands*, 993 F.2d at 1342.

In cases where the public employer cannot demonstrate that the employee's speech disrupted the workplace, however, the court need not proceed to a specific *Pickering* factor analysis absent exceptional circumstances. In *Sexton v. Martin*, we noted that some evidentiary showing is a threshold inquiry to the appropriate application of the *Pickering* factors. 210 F.3d 905, 911-12 (8th Cir. 2000).

> Before the Court commences the *Pickering* balancing test, however, it is critical to determine whether the defendant has produced sufficient evidence that the speech had an adverse effect on the efficiency of the employer's operations. In other words, to put the *Pickering* balancing test at issue, the public employer must proffer sufficient evidence that the speech had an adverse impact on the department. The more the employee's speech reflects matters of public concern, the greater the employer's showing must be that the speech was disruptive before the speech can be punished.

Id., 210 F.3d at 911-12 (citing *Burnham v. Ianni*, 119 F.3d 668, 678-79 (8th Cir. 1997). "Mere allegations of disruption are insufficient to put the *Pickering* balance at issue." *Id.* at 912; *see Kincade*, 64 F.3d at 398-99. Where there is no evidence of disruption, resort to the *Pickering* factors is unnecessary because there are no government interests in efficiency to weigh against First Amendment interests.

The defendants argue that the district court erred in refusing to submit to the jury three interrogatories addressing specific *Pickering* factors and instead substituting a broader inquiry as to whether the functions of the Eldon city government had been impeded. They assert that the district court's interrogatories provided an insufficient factual basis for the court to rule on the *Pickering* test and that under a proper application of the test they are entitled to judgment as a matter of law.

The district court has broad discretion in ruling on proffered jury instructions, and its decision is subject to reversal only if the instructions, viewed in their entirety, contained an error or errors that affected the substantial rights of the parties. *See Horstmeyer v. Black & Decker*, 151 F.3d 765, 771 (8th Cir. 1998). So long as the charge as a whole adequately states the law, the district court has discretion over the "style and wording" of instructions. *See id.* (quoting *Beckman v. Mayo Found.*, 804 F.2d 435, 438 (8th Cir. 1992)).

The defendants argue that their evidence that Belk's speech was disruptive was sufficient to raise a factual question of workplace impediment, pointing to Belk's testimony that Link's reaction to her speech made it difficult for Belk to perform her job. Belk counters that Link's reaction to her speech is properly understood as part of the city's retaliatory behavior and should not be considered when determining whether her speech was disruptive in and of itself.

In *Burnham*, we held that a "government employer must make a substantial showing that the speech is, in fact, disruptive before the speech maybe punished." 119 F.3d at 680. Although the record contains ample evidence that Eldon's city hall had become a tumultuous place to work, there is no indication that Belk's speech was the cause of that tumult. Belk's testimony that Link's reaction to her statements made her job more difficult is insufficient to show disruption without some evidentiary showing that the functioning of the city government suffered as a result of her discomfort. Accordingly, the district court cannot be said to have abused its discretion by submitting the threshold inquiry, rather than the specific *Pickering* factors, to the jury.

We conclude that the defendants failed to demonstrate sufficient evidence of workplace disruption to bring the *Pickering* factors into play and that the jury charge, as given, fairly and accurately stated the law to the jury. Moreover, the jury's specific finding that Belk's speech posed no

impediment to the functioning of the city administration obviated the need for interrogatories incorporating the *Pickering* factors. Thus, the district court did not abuse its discretion in declining to submit them to the jury, and the defendants were not entitled to judgment as a matter of law on this issue.

C. Qualified Immunity

The defendants argue that even if Belk's termination was actionable, the district court erred in not dismissing the claims against Wood, Veach, Harrison, and Bly personally. In essence, the four aldermen assert that they acted reasonably and within their official capacities and that they were therefore entitled to qualified immunity. We disagree.

The doctrine of qualified immunity protects state actors from civil liability when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (internal citations omitted). Qualified immunity applies in a retaliatory discharge case if (1) the plaintiff has asserted a violation of a constitutional or statutory right, and (2) that right was not clearly established when the plaintiff was discharged. *Sexton*, 210 F.3d at 909. If the unlawfulness of the official's conduct is apparent in view of preexisting law, the qualified immunity defense ordinarily fails, since "a reasonably competent public official should know the law governing his conduct." *See id.* (quoting *Harlow*, 456 U.S. at 818-19). Thus, the aldermen are entitled to qualified immunity only if Belk's right to free speech was not clearly established at the time of her discharge. *See id.*

Belk was discharged in 1995. As early as 1985, the Supreme Court had found a clear First Amendment protection for public employees. "It is clearly established that a State may not discharge an employee on a basis that infringes that

employee's constitutionally protected interest in freedom of speech." *Rankin*, 483 U.S. at 382. Our own precedent evidences this principle as well. *See Hafley v. Lohman*, 90 F.3d 264, 267 (8th Cir. 1996) (holding that retaliatory discharge is a clearly established First Amendment violation); *Casey*, 12 F.3d at 804 ("No right is more clearly established in our republic than freedom of speech.").

The crux of the defendants' argument is that, because the evaluation of Belk's claim implicates *Pickering*, they are automatically entitled to qualified immunity. Although we have held that public employers are not required to anticipate the outcome of the delicate *Pickering* balancing, *see Grantham v. Trickey*, 21 F.3d 289, 292 (8th Cir. 1994), that reasoning applies only to cases where the employer has made some showing of impediment to its efficient functioning. Where, as here, the employer has failed to demonstrate any disruption, there is no balancing to be done and the evidentiary failure is fatal to the claim of qualified immunity. *See Sexton*, 210 F.3d at 913.

The defendants also argue that their reliance on the opinion of an attorney-investigator renders their actions reasonable and should bring them within the protection of qualified immunity. We find this argument unpersuasive. The investigator testified that he did not know of Belk's statements to Dolby. The board therefore could not reasonably have relied on his assurances that discharging Belk would not constitute a violation of her First Amendment rights. Thus, the district court properly denied the defendants' motion.

III. Front Pay

Finally, the defendants contest the district court's front pay award. Pointing to Belk's acquisition of a new job and to her farming investments, they argue that the district court's award amounts to a windfall for Belk. In particular, they contend

that the court's use of a ten-year period to calculate the front pay amount was excessive. We disagree.

"The calculation of front pay, which is necessarily uncertain, is a matter of equitable relief within the district court's sound discretion." *Hukkanen v. International Union of Operating Eng'rs*, 3 F.3d 281, 286 (8th Cir. 1993). The purpose of an award of front pay is to compensate a wrongfully terminated employee where reinstatement is not a practical alternative. *See Denesha v. Farmer Ins. Exchange*, 161 F.3d 491, 501-02 (8th Cir. 1998). "[C]ourts will presume for the purposes of awarding relief that an illegally discharged employee would have continued working for the employer until he or she reaches normal retirement age, unless the employer provides evidence to the contrary." *MacDissi v. Valmont Industries. Inc.*, 856 F.2d 1054, 1060 (8th Cir. 1988). In *Hukkanen*, we held that an award of front pay calculated for a ten-year period was within the district court's discretion. 3 F.3d at 286.

The district court reduced the jury's recommendation of $310,000 in front pay, awarding Belk $119,000. The court calculated the difference between Belk's current salary and her salary during her employment with the city of Eldon, multiplied that difference by ten years, and discounted that amount to a present value of $119,000. Nothing in the record suggests that ten years is an unreasonable length of time in this case. In fact, the district court particularly noted that Belk's limited education and Eldon's rural location would make it difficult for Belk to find a job that would compensate her as well as her employment with the city.

The defendants also argue that the district court ought to have offset Belk's front pay award by her anticipated farming income. Defendants themselves point out, however, that Belk had begun to make her agricultural investments while still employed with the city. Thus, any farming income would have been additional to her salary as a city employee.

Because the purpose of awarding front pay is to compensate the plaintiff for what she would have had but for her wrongful termination, the district court was correct in not penalizing Belk for farming income that she would have had in any case.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

Case No. 97-4174-CV-C-5-ECF

LAVERNE BELK,

Plaintiff,

v.

CITY OF ELDON, *et al.*,

Defendants.

ORDER DENYING DEFENDANTS MOTION FOR JUDGMENT AS A MATTER OF LAW AND FOR NEW TRIAL

Pending before the Court is Defendants' Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial. For the reasons set forth below, the Motion is denied.

I. Introduction and Background

This matter was tried before a jury in November 1998. At the conclusion of the trial, Plaintiff Laverne Belk submitted to the jury claims of sex discrimination and First Amendment retaliation. The jury rendered a verdict in favor of the Defendants on the discrimination claim and for Belk on the retaliation claim. The jury awarded Belk $60,000 in back pay and $80,000 in other damages. The issue of front pay was submitted to the jury on an advisory basis, and the jury found $310,000.00 to be an appropriate award.

The main theory of Belk's First Amendment retaliation claim was that she was fired by the City of Eldon because she spoke with Alderman Dolby in October 1995. In that

conversation, she reported that the City Administrator, Jim Link, was having an affair with a city employee and he was paying the employee benefits to which she was not entitled. Viewing the evidence in the light most favorable to Belk, she proved that her private conversation with Dolby was reported to the city attorney who, in turn, told Jim Link. Other Aldermen were also told about the accusation. The response of the Board was to authorize Link to reorganize the department and to terminate anyone except an elected city official.

At the time, Belk held two positions with the city. She was the assistant city administrator and the city clerk. Her position as city clerk was an elected position and she had been reelected by the Board of Aldermen each April for the last 14 years. Link was, therefore, not able to terminate Belk so long as she was city clerk. Instead, Link removed her title of assistant city administrator, eliminated her supervisory duties, demeaned her publicly, wrote false performance reports and then, five months later, requested the Board of Aldermen to replace Belk as city clerk, and the Board complied.[1]

On the same day that Belk was not reelected as clerk, Link gave Belk notice that the city was contemplating serious disciplinary action against her which could result in her termination. After Belk challenged Link's disciplinary allegations, Link concluded that the Board of Aldermen should decide her fate, not him. The Board then hired an outside consultant, Ivan Schroeder, to investigate the conflict between Belk and Link. Schroeder recommended that Belk and Link both be fired. At first, the Board rejected the recommendation and voted to fire Belk but not Link. Then, in an effort to get a unanimous vote, the Board decided to fire

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[1] Shortly after learning of the accusation against him, Link sent another employee, Betty Rayhart, to be trained to be a city clerk. This is the person eventually elected by the Board to replace Plaintiff.

Belk immediately and not renew Link's contract, which was set to expire approximately four months later. Link, however, could continue thereafter on a month-to-month basis.

After Plaintiff was not reappointed as city clerk, she attended some meetings of a group named Concerned Citizens of Eldon. Prior to terminating her, some City Aldermen had told her that her presence at the meetings was inappropriate, given her position with the city.

II. Standard of Review

The Defendants' post-trial Motion seeks both a new trial and judgment as a matter of law. A motion for judgment as a matter of law challenges the sufficiency of the evidence. In ruling on such a motion, the Court is required to examine the record and review the testimony in the light most favorable to the prevailing party. *Farner v. Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir. 1977). During its review of the record, the Court is not permitted to assign credibility to the witnesses or weigh the evidence. *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1105, n.3 (8th Cir. 1981). "Judgment as a matter of law is proper 'only when there is a complete absence of probative facts to support the conclusion reached' so that no reasonable juror could have found for the nonmoving party." *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir. 1997) (quoting *Lavender v. Kurn*, 327 U.S. 645, 653 (1946)).

On the other hand, "a motion for new trial invokes the discretion of the Court by asserting that the verdict was against the weight of the evidence or that for other reasons of law the trial was manifestly unjust." *California & Hawaiian Sugar Co. v. Kansas City Terminal Warehouse Co., Inc.*, 602 F. Supp. 183, 186 (W.D. Mo. 1985), *aff'd*, 788 F.2d 1331 (1986) *(citing Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 252 (1940)). In ruling on a motion for new trial, "the trial court can rely on its own reading of the evidence—it can weigh the evidence, disbelieve witnesses, and grant a new

trial even where there is substantial evidence to sustain the verdict." *Harris v. Secretary, United States Dep't of the Army,* 119 F.3d 1313, 1318 (8th Cir. 1997) *(quoting Ryan by Ryan v. McDonough Power Equip., Inc.,* 734 F.2d 385, 387 (8th Cir. 1984)). The trial court is given very broad discretion in granting or denying a motion for new trial. *Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 36 (1980).

III. Analysis and Discussion

A. Submissibility of the First Amendment Retaliation Claim

Defendants initially challenge the submissibility of the First Amendment retaliation claim on the basis that Belk failed to prove that her speech was protected.[2] Generally, resolution of the issue of whether a public employee's speech is constitutionally protected requires a two-step judicial inquiry. First, the Court must decide "whether the employee's speech can be 'fairly characterized as constituting speech on a matter of public concern.'" *Barnard v. Jackson County, Mo.,* 43 F.3d 1218, 1223 (8th Cir.), *cert. denied,* 516 U.S. 808 (1995) *(quoting Connick v. Myers,* 461 U.S. 138, 146 (1983); *Shands v. City of Kennett,* 993 F.2d 1337, 1342 (8th Cir. 1993), *cert. denied,* 510 U.S. 1072 (1994)). If the answer to this question is yes, then the Court must undertake the

[2] Belk originally alleged in this case that her First Amendment retaliation claim was based upon speech which took place in two separate forums. First, Belk alleged that the Defendants retaliated against her based upon her conversation with Alderman Harold Dolby in October 1995. Second, Belk alleged that the Defendants retaliated against her for her participation Concerned Citizens of Eldon. Based upon the evidence that was introduced at trial, the Court ruled that Belk's allegations concerning the Citizens Group would be submitted as a freedom of association claim, rather than a free speech claim, due to the fact that Belk testified at trial that she did not speak at the meetings, except to answer questions directed at her.

Pickering balancing test. *Barnard*, 43 F.3d at 1223 *citing Pickering v. Board of Educ. of Tp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968)). This test "involves balancing the employee's right to free speech against the interests of the public employer." *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 395 (8th Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996) (*citing Rankin v. McPherson*, 483 U.S. 378, 388 (1987)). *See also, Shands*, 993 F.2d at 1342, *reh g denied*, 483 U.S. 1056 (1987).

In the instant case, there were underlying factual disputes relating to the nature and substance of Belk's speech and whether her speech impeded the efficient operation of the City of Eldon's governmental function. Accordingly, the Court submitted these factual issues to the jury through the use of special interrogatories.[3] With the jury's factual

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[3] The special interrogatories submitted to the jury, as well as the jury's responses, were as follows:

Question No. 1: Has it been proved by the greater weight of the evidence that LaVerne Belk told Harold Dolby in October 1995 that a city employee was receiving benefits to which the employee was not entitled? Yes X No __

Question No. 2: Has it been proved by the greater weight of the evidence that plaintiff's statements to Harold Dolby in October 1995 impeded the efficient operation of the City of Eldon's governmental function? Yes __ No X

Question No. 3: Has it been proved by the greater weight of the evidence that plaintiff's attendance at Eldon Concerned Citizens Committee meetings impeded the efficient operation of the City of Eldon's governmental function? Yes __ No X

Question No. 4: Has it been proved by the greater weight of the evidence that LaVerne Belk did not speak at the Eldon Concerned Citizens Committee meetings

findings in hand, the Court turns to the question of "whether the speech addressed a matter of public concern, that is, a matter of political, social, or other concern to the community." *Shands,* 993 F.2d at 1343 *(citing Connick,* 461 U.S. at 146). In order to make such determination, the Court must review the content, form and context of the speech based upon the record as a whole. *Id. See also, Pickering,* 461 U.S. at 147-48; *Smith v. Cleburne County Hosp.,* 870 F.2d 1375, 1381 (8th Cir.), *cert. denied,* 493 U.S. 847 (1989). "[S]peech is a matter of public concern when a public employee speaks as a concerned citizen, but not when the employee speaks as an employee." *Bausworth v. Hazelwood Sch. Dist.,* 986 F.2d 1197, 1198 (8th Cir. 1993). *See also, Connick,* 461 U.S. at 147 ("[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision.")

The Defendants contend that Belk's communication to Alderman Dolby in October 1995, addressed "only internal personnel matters" within the City's administration, and therefore, did not address a matter of public concern. However, Defendants' contention ignores the jury's specific finding that in her conversation with Dolby, Belk told him that a part-time city employee, that was rumored to be having an affair with the City Administrator, was receiving benefits which Belk did not believe the employee was entitled to

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except to answer questions directed to her? Yes X No __

Question No. 5: Has it been proved by the greater weight of the evidence that LaVerne Belk made statements at the Eldon Concerned Citizens Committee meetings which were critical of city administration or city personnel? Yes __ No X

receive. Belk's speech alleges malfeasance in the manner in which the City was spending public funds, and therefore, constitutes "speech on a matter of public concern." *See, Kincade,* 64 F.3d at 396 (Courts "generally have held that speech about the use of public funds touches upon a matter of public concern."); *Pausworth,* 986 F.2d at 1199 ("[S]peech that either directly, or by reasonable inference, criticizes public officials' use of the public's funds, lies at the core of the speaker's First Amendment rights.") *See also, Casey v. City of Cabool, Mo.,* 12 F.3d 799, 802 (8th Cir. 1993), *cert. denied,* 513 U.S. 932 (1994); *Shands,* 993 F.2d at 1343.[4]

Having found at least one aspect of Belk's speech to have touched upon a matter of public concern, the next inquiry under the *Pickering* test is whether Belk's interest in expressing herself is "outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs.'" *See, Waters v. Churchill,* 511 U.S. 661, 668 (1994). "Under the *Pickering* balancing test, the primary focus of the [employer's] interest element is to determine whether the speech undermines 'the effective functioning of the public employer's enterprise.'" *Kincade,* 64 F.3d at 397. "Factors relevant in conducting this test are whether the speech creates disharmony in the workplace, impedes the speaker's ability to perform his[/her] duties, or impairs working relationships

[4] The fact that Belk included in her conversation with Dolby, certain matters that may or may not address a matter of public concern, i.e., that she heard rumors from several sources regarding the alleged affair between the City Administrator and the subject employee, does not diminish the First Amendment protection afforded the speech that clearly did address a matter of public concern. *See, Shands,* 993 F.2d at 1343. Furthermore, the fact that Belk communicated her concerns privately to Dolby, as opposed to publicly, does not negate the public nature of the subject of her speech. *See, Roberts,* 773 F.2d at 955 *(citing Connick,* 461 U.S. at 146); *Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410 (1979)).

with other employees." *Id. (citing Shands,* 993 F.2d at 1344). *See also, Tedder v. Norman,* 167 F.3d 1213, 1215 (8th Cir. 1999) *(citing Casey,* 12 F.3d at 803). "The manner, time, and place of the employee's expression are also relevant" to the inquiry. *Tedder,* 167 F.2d at 1215 *(quoting Rankin v. McPherson,* 483 U.S. 378, 388 (1987)). The Eighth Circuit has cautioned that "[t]he *Pickering* balance is flexible, and the weight to be given to any one factor depends upon the specific circumstances of each case." *Shands,* 993 F.3d at 1344 *(citing Germane v. City of Kansas City,* 776 F.2d 761, 764 (8th Cir. 1985), *cert. denied,* 479 U.S. 813 (1986)).

Focusing first on Belk's interest, the Eighth Circuit has recognized that "a citizen's right to be critical of government and government officials lies at the core of the principle of free speech." *Casey,* 12 F.3d at 803. Based upon the fact that Belk, as City Clerk and Assistant City Administrator, was in charge of completing the City's financial statements, and she believed that the City's payroll records revealed some impropriety in the use of public funds, the Court finds that Belk's interest in speaking to Dolby, and other Aldermen, about the issue was substantial.

Turning to the interests of Belk's employer, the Defendants stress the importance of a close working relationship between the City Administrator and Belk, and allege that her statements concerning his alleged affair and impropriety in using public funds, created disharmony in the relationship. It is not surprising that there would be disharmony between Belk and the person she accused of personal and financial improprieties. However, "it is not permissible to use the power of government for the private purpose of protecting those who hold government office." *Casey v. City of Cabool,* 12 F.3d 799, 803 (8th Cir. 1993). Furthermore, the Defendants have failed to show that Belk's speech caused, or was likely to cause, disruption in the workplace, or inefficiency in government services. The jury seems to have

concluded that it was Link, not Belk, who was creating disharmony in the office. In fact, although the Defendants testified at length about dissension and turmoil at City Hall, they had no first-hand knowledge to support an inference, that Belk was the cause of the dissension and turmoil. Additionally, although Ivan Schraeder, the individual who investigated the turmoil at City Hall, testified that the City employees had divided up sides and were supporting either Link or Belk, Defendants failed to offer any compelling evidence from the City employees involved to show that the division had occurred because of any action on the part of Belk. Considering the evidence in the light most favorable to the Plaintiff, the only reason the issue became public at all was because Dolby did not keep his conversation with Belk confidential. Link was told who made the accusation against him and Link then systematically forced the Plaintiff out of city government. *See, Kincade,* 64 F.3d at 398. The Court has also considered the fact that prior to Belk's statement to Dolby, there was no conflict between Belk and Link. Hence, there is no evidence that Belk made the accusation because of personal animus or because she was seeking personal gain. There was also significant evidence to support the accusation and there was a reason for not following the chain of command.

The Defendants stress in their briefing that "[g]overmnent predictions of disruption used to justify restrictions of employee speech are given 'greater deference' than predictions used to justify restriction on speech by the public," and that such predictions are usually "entitled to substantial weight." *Tindle v. Caudell,* 56 F.3d 966, 972 (8th Cir. 1995) *(citing Waters,* 511 U.S. at 673). *See also, Burnham v. Ianni,* 98 F.3d 1007, 1014 (8' Cir. 1996), *aff'd,* 119 F.3d 668 (1997). However, the case law establishes that such predictions of harm must be reasonable, *see, Tindle,* 56 F.3d at 972, and under the facts of this case, the Defendants have not made such a showing. The evidence clearly showed

disruption at City Hall, but the Defendants failed to show that such disruption was caused by Belk's statements concerning the payment of benefits, as opposed to anything else that was happening in the workplace.[5]

Defendants also challenge in their Motion, the submissibility of the retaliation claim on the basis that Belk allegedly failed to prove causation. Belk contends that Defendants are precluded from raising this challenge because they failed to raise the issue in their Rule 50(a) Motions. The Federal Rules of Civil Procedure state that a motion for judgment as a matter of law must "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Fed. R. Civ. P. 50(a)(2). A post-verdict motion for judgment as a matter of law "can be granted only on grounds advanced in the pre-verdict motion." Fed. R. Civ. P. 50(b), Advisory Committee Notes to the 1991 Amendment to Subdivision (b). *See also, Hurst v. Dezer/Reyes Corp.*, 82 F.3d 232, 237 (8th Cir. 1996) ("[A] post-verdict JAML motion must be limited to grounds asserted prior to submission of the case to the jury."); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1061 (8th Cir. 1993) ("A party who has moved for a directed verdict may then move for judgment notwithstanding the verdict but only 'in accordance with the party's motion for a directed verdict.'")

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[5] The Court is not persuaded by the Defendants' contention that this case is analogous to *Shands* and/or *Germann*. Both cases involved public safety organizations which the Eighth Circuit has stated "ha[ve] a more significant interest then the typical government employer in regulating the speech activities of its employees in order 'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence' in [their] ability." *Shands*, 993 F.2d at 1344. The fact that the City might have had some general, administrative oversight of the fire and police departments does not change the fact that the City itself, was a typical government employer, and not a public safety organization.

The Defendants do not dispute that the issue of causation was not addressed in their Rule 50(a) Motions.[6] Defendants argue, however, that they objected to the retaliation instruction, Instruction No. 15, on the basis of "submissibility," during the instruction conference, and therefore, they properly preserved the issue for the Court's consideration. Due to the fact that the Defendants failed to "specify the law and the facts on which [they claimed they were] entitled to the judgment," Fed. R. Civ. P. 50(a)(2), the Court understood the objection as relating to the issue of whether Belk had established that her expression was protected by the First Amendment, as argued in the Defendants' Rule 50(a) Motions and discussed during the instruction conference, not whether Belk could prove causation between her expression and her termination. The purpose of requiring a party to specifically set forth the law and facts supporting a pre-verdict motion for judgment as a matter of law, is to allow the responding party the opportunity "to correct any overlooked deficiencies in the proof." Hurst, 82 F.3d at 237. Although "technical precision" is not required in setting forth the grounds for a pre-verdict motion, *see, Jarvis v. Sauer Sundstrand Co.,* 116 F.3d 321, 323 n.4 (8th Cir. 1997), the record in this case, establishes that Belk, as well as the Court, lacked fair notice of the alleged defect in causation. Accordingly, the Defendants are precluded from raising their challenge in their post-trial Motion for Judgment

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[6] Defendants' Motions for Judgment as a Matter of Law, provided in relevant part: "Plaintiff has failed to establish that her expression, if any took place, was protected by the First Amendment to the United States Constitution. The undisputed evidence indicates that she was engaged in insubordination in the work place and outside, directed at her immediate supervisor, James Link. Such conduct is not protected by the First Amendment." The Motion, therefore, challenges whether Belk's speech addressed a matter of public concern, not whether Belk had established sufficient causation between her speech and the resulting non-reelection and termination.

as a Matter of Law.[7] However, the Court must still address the issue in the context of Defendants' motion for a new trial.

The First Amendment Retaliation Instruction required that the following two elements be proven by the greater weight of the evidence:

> *First*, defendants did not elect plaintiff as City Clerk in April 1996 and discharged plaintiff in May 1996; and
>
> *Second*, plaintiff's statements to Harold Dolby in October 1995 and attendance at meetings of the Eldon Concerned Citizens Committee were motivating factors in defendants' decisions.[8]

Defendants argue in their post-trial Motion that Belk admitted in her trial testimony that she was not aware of the Concerned Citizens Committee prior to Rayhart being elected as City Clerk in April 1996. Defendants conclude that based upon Belk's testimony, the evidence does not support a finding that Belk's role in the Committee formed any part of the decision to not elect her as City Clerk, and therefore, the verdict was based upon insufficient evidence.[9]

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[7] This is especially important in this case where the verdict directing instruction required Belk to prove more than was necessary in support of her claim. Had the Defendant identified what he now is arguing, Belk would not have requested the instruction which was given. This is just the sort of problem that Rule 50 and Rule 51 were designed to address.

[8] The conjunctive format of this instruction was specifically requested by Belk. It is clear, however, that Belk could have succeeded by showing that her termination was caused either by her statement to Dolby or her brief association with the Eldon Concerned Citizens Committee.

[9] The Defendants further point out that a couple of notes sent by the jury during their deliberations support their argument that the jury concluded that Belk's participation in the Concerned Citizens Committee played no role in either of the disputed decisions relating to her employment. One of the notes read as follows:

The Court finds that, based upon the testimony at trial, the jury could not have found that Belk's participation in the Citizens Committee was a motivating factor in the Defendants' decision to not elect her as City Clerk in April 1996, because there was no evidence that Belk participated in the committee until after the election. However, the Court does not believe that the error mandates a new trial. The instruction required that the jury find both that Belk's statements to Dolby in October 1995 and her attendance at the Eldon Concerned Citizens Committee meetings, were motivating factors in the Defendants' decisions. The verdict, however, can be sustained if Belk's statements to Dolby were a motivating factor in the Defendants' decisions to terminate and not elect her as city clerk. It was not necessary for her to prove that her involvement with the Concerned Citizens of Eldon also caused her termination. The real question then is whether the jury's finding that Belk's statement to Dolby motivated the Board to terminate her and not elect her as city clerk, was so against the weight of the evidence that it would be manifestly unjust to permit the verdict to stand. Having considered the evidence in the light most favorable to Belk, the Court concludes that the evidence at trial supports the jury's finding on this issue.

In order for the jury to have found that the Aldermen took retaliatory action against Belk which violated the First

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> We unanimously feel that the preponderance of evidence indicates that plaintiff's statements to Harold Dolby was [sic] a motivating factor in the defendants' decisions and that the plaintiff's attendance at meetings of the Eldon C.C.C. were insignificant and immaterial to the defendants' decisions. Given these facts, is this sufficient grounds to vote in favor of the plaintiff?

Another of the notes read:

> Pertaining to Instruction No. 15, Item No. 2 wording (line 5), does the preponderance of the evidence have to apply to both the statement to Harold Dolby, *and* Eldon CCC or can it apply to just one or the other?

Amendment, there has to be some evidence that the majority of the Aldermen either had actual or constructive knowledge of Belk's statements to Dolby regarding the improper use of public funds. *See, Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 818 (8th Cir. 1998) *(quoting Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995) ("[P]laintiff must show that 'the employer had actual or constructive knowledge of the protected conduct' in order to establish a prima facie case of retaliation [under Title VII]."); *Wolff v. Berkley, Inc.*, 938 F.2d 100, 103 (8th Cir. 1991) ("[C]ausal link [between statutorily protected activity and an adverse employment action] does not exist if the employer is not aware of the employee's statutorily protected activity.")) In this case, Belk's conversation with Dolby took place in private and there was no direct evidence presented at trial that any of the Aldermen spoke to Dolby about Belk's statements. The evidence did show that Dolby told the city attorney and the mayor about Belk's allegations and the evidence supports the inference that the city attorney talked to other Aldermen about it. It simply defies common sense that the Board of Aldermen met in executive session to discuss the allegation, but there was no discussion about the nature of the allegation, to whom it was made or who made it. This is especially so since the Board of Aldermen at that meeting gave Link carte blanche to reorganize his office, short of terminating an elected city official. The only city official that worked directly under Link was Belk and the day after the Board's meeting, Link stripped Belk of all supervisory responsibilities, but she was not fired until after the conclusion of her term as city clerk. The logical inference from this evidence is that the Board of Aldermen were aware of Belk's statement to Dolby.

Alternatively, the jury's finding is supported by the cat's paw theory. Link knew about Plaintiff's conversation with Dolby and the evidence supported a finding that he retaliated against her by getting the Board of Aldermen not to elect her

as clerk and then to terminate her. *See, Lacks v. Ferguson Reorganized Sch. Dist.* R-2, 147 F.3d 718, 725 (8th Cir. 1998), *cert. denied,* 119 S. Ct. 1158 (1999); *Kramer v. Logan City Sch.*, slip op. No 97-3132 (8th Cir., Oct. 14, 1998). The jury simply did not believe that the Board relied on Ivan Schraeder's recommendation. Their belief is supported by the evidence. At the time the Board first investigated Belk's statement to Dolby, they told Link that he had carte blanche to terminate anyone from any position unless it was an elected position. Hence, long before Schraeder's report, the Board of Aldermen had authorized Link to take action against Belk. Furthermore, even though their neutral investigator recommended firing both Link and Plaintiff, the majority of the Board only wanted to fire Plaintiff. The reason the Board finally decided not to extend Link's contract was to get a unanimous vote. The fact that Link was ultimately hurt by this conflict does not negate his successful efforts to get Plaintiff fired, which is all that the cat's paw theory requires.

Defendants also argue that the evidence of the timing of the adverse action, standing alone, is insufficient to support the verdict. The Eighth Circuit has held that mere temporal proximity between protected activity and adverse employment action, in the absence of any other evidence supporting a finding of a retaliatory motive, in most cases, is insufficient to support a finding for the plaintiff. *See, Ghane v. West,* 148 F.3d 979, 983 (8th Cir. 1998) (Summary judgment affirmed on retaliation claim where plaintiff presented "no evidence of a causal connection between those protected activities and his discharge except for the mere temporal proximity between his [protected activity] . . . and his termination.). *See also, Nelson v. J.C. Penney Co., Inc.*, 75 F.3d 343 (8th Cir. 1996), *cert. denied,* 519 U.S. 813 (1996); *Barnard v. Jackson County, Mo.*, 43 F.3d 1218 (8th Cir.), *cert. denied,* 516 U.S. 808 (1995). However, the Eighth Circuit has also noted that "[t]he passage of time between events does not by itself foreclose a claim of retaliation."

Smith v. St. Louis Univ., 109 F.3d 1261, 1266 (8th Cir. 1997). What the Court is required to do is examine the circumstances of the case and determine whether the evidence taken as a whole, establishes a causal connection between the protected activity and the adverse action. *Id.* In the instant case, as previously discussed, the timing of the adverse action was not the sole evidence offered by Belk to support her retaliation claim. Belk also demonstrated, through witness testimony, that there was not a legitimate basis for the adverse actions taken by the Aldermen and that the Aldermen thought Belk was wrong to talk to Dolby and wrong to attend the Concerned Citizens meetings. Finally, there is a clear explanation why it took so long to fire Belk. As an elected city clerk, her term did not expire until April 1996. She could be fired from her position as assistant city manager but she couldn't be fired from her position as city clerk. As soon as she was no longer city clerk, Link started disciplinary action against Belk. Shortly thereafter, she was terminated.

The final challenge raised by the Defendants relating to the retaliation claim involves the Court's rejection of Defendants' proffered special interrogatories. In the proffered interrogatories, the Defendants sought to have the jury make a determination as to legal issues which were to be decided by the Court as a matter of law, e.g., "[did the] plaintiff express . . . views on issues of public concern." Additionally, the Defendants sought to have the jury address issues which were included in the verdict director on the retaliation claim, e.g., whether plaintiff's speech "was a motivating factor in defendants' decision to discharge her" and whether "defendants would have discharged plaintiff regardless of her expression on matters of public concern." As set forth in the Committee Comments to the Eighth Circuit Model Jury Instructions, the purpose of the special interrogatories is to assist the Court in resolving factual issues associated with the required analysis under *Pickering*. The interrogatories are not an appropriate mechanism to submit questions of law to the

jury, nor should the interrogatories be used as a substitute for the verdict director for First Amendment retaliation claims set forth in Model Instruction 5.71. *See,* Eighth Circuit Model Jury Instruction 5.71, Committee Comments ("[The] model instruction [verdict director] may be supplemented with a set of special interrogatories.") Accordingly, the Court finds that the rejection of the Defendants' proffered special interrogatories was proper.

B. Front Pay

Front pay is an equitable remedy which district courts have discretion to award in cases where reinstatement may not be appropriate. *Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 321-22 (8th Cir. 1993). The plaintiff carries the initial burden of proving the basis for a front pay award, and then the burden shifts to the defendant to prove front pay is inappropriate. *Curtis v. Electronics. & Space Corp.*, 113 F.3d 1498, 1503 (8th Cir. 1997). Although the Eighth Circuit has not provided "a strict formulation for determining a front pay award, the Sixth Circuit has provided the following list of factors" to be considered:

> the plaintiff's duty to mitigate; the availability of employment opportunities; the period within which one by reasonable efforts may be reemployed; the plaintiff's work and life expectancy; the use of discount tables to determine present value of future damages; and any other relevant factors.

Rasmussen v. Quaker Chem. Corp., 993 F. Supp. 677, 683 (N.D. Iowa 1998) *(citing Roush v. KFC Nat'l Management Co.*, 10 F.3d 392 (6th Cir. 1993), *cert. denied,* 513 U.S. 808 (1994)). "The Eighth Circuit has stated that a plaintiff's efforts to mitigate must be honest and made in good faith but, ultimately, such efforts need not be successful." *Rasmussen,* 993 F. Supp. at 684 *(citing Hukkanen v. International Union of Operating Eng'rs, Hoisting & Portable Local No. 101,* 3

F.3d 281, 286 (8th Cir. 1993)). The purpose of front pay is to make the plaintiff whole, however "the court must avoid granting the plaintiff a windfall." *Standley*, 5 F.3d at 322.

The Eighth Circuit has recognized that the calculation of front pay is uncertain. Courts "do not know how long the plaintiff actually would have remained working at the job, whether the plaintiff soon would have left for a different, perhaps better-paying job, or whether the plaintiff soon would have been dismissed for legitimate reasons." *Standley*, 5 F.3d at 322. Accordingly, district courts are given broad discretion in fashioning an appropriate front pay award. *Hukkanen*, 3 F.3d at 286.

In this case, the issue of front pay was submitted to the jury on an advisory basis. The jury determined that Belk should be compensated for the difference between her current level of pay in her employment with the Department of Health, and her former level of pay with the City, i.e., ($17,000.00), over the course of the next approximately 18 years, totaling an amount of $310,000.00. However, based upon the circumstances of the case, as well as the specific evidence presented by the parties relating to the issue of front pay, the Court finds the advisory award to be excessive.

Based upon the locale of Belk's residence, her level of education, and the publicity surrounding her termination, Belk had few, if any, prospects of finding comparable employment. But in order to avoid a windfall to Belk, the Court must determine how long Belk would continue to be underemployed if she were to make reasonable efforts to find comparable alternative employment. The Court notes that it has taken into consideration the fact that Belk testified that she intended to remain at the Department of Health, despite the significant reduction in pay, and that she was devoting a substantial portion of her time to a new family-owned hog business. The Court has also considered the fact that the City Clerk position, although occupied by Belk for several years,

was a continuing one-year appointment. On the other hand, Belk's salary at the city is irreplaceable given her education, the extremely limited job opportunities in her rural community, and the number of years it took her to attain that salary with the city.

The Court finds that, based upon the factors set forth above and the specific circumstances of this case, the appropriate front pay period is ten (10) years. If the Court were to allow front pay damages for a longer period of time, the Court finds that the award would be unduly speculative. *See, Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056 (7th Cir. 1990). Accordingly, the Court will enter an award of front pay in the amount of $119,000.[10]

The Court notes that it is not persuaded by Defendants' argument that the United States Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), precludes the Court from entering a front pay award. In *McKennon*, the Supreme Court held that front pay is not an appropriate remedy in cases where the employer establishes that after an alleged wrongful termination it discovered wrongdoing on the part of the employee for which it would have terminated the employee, had it been aware of such conduct. *Id.* at 361-62. The Supreme Court explained that "[i]t would be both inequitable and pointless to order the reinstatement of someone [or front pay in lieu of reinstatement, where] the employer would have terminated [the employee], in any event and upon lawful grounds." *Id.*

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[10] The front pay calculation is the difference between Belk's current and former rates of pay, $17,000.00, over a 10-year period, i.e. $170,000.00, discounted to present value. *See, Bevan v. Honeywell*, 118 F.3d 603, 613 (8th Cir. 1997) (In determining the amount of the award, the court must consider all aspects of the case and reduce the award to its present value.)

In their Motion, the Defendants argue that they would have fired Belk if they would have known that she received copies of documents that her friend, Rosie Willis, had secretly obtained from the desk of another employee. In support of its claim that it would have fired Belk, Defendants offer the affidavit of only one of the Aldermen, Ronald Bly. As set forth in Bly's affidavit, he learned this information during testimony which was presented in Belk's case in chief. However, Defendants did not raise this issue in either of their Rule 50(a) Motions, nor did they otherwise raise this issue during trial. Additionally, the Defendants have presented the affidavit of only one of the Aldermen who claims he would have voted to terminate Belk's employment based upon this information. Wholly apart from the fact that each of the Aldermen testified at trial that they did not get involved in day-to-day personnel matters, Defendants have failed to show that the vote of one Aldermen would have been sufficient to terminate Belk's employment with the City. Accordingly, the Court finds Defendants' argument concerning the applicability of the *McKennon* case to be without merit.

C. Qualified Immunity

The doctrine of qualified or "good faith" immunity provides a degree of protection for government officials from civil suits arising out of their performance of discretionary functions. Under the doctrine, government officials are immune from lawsuits when their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). A right is clearly established if "a reasonable official would understand that what he[/she] is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987), *aff'd,* 922 F.2d 443 (1990). In other words, "the unlawfulness must be apparent" to the official "in the light of pre-existing law." *Id.* (*citations omitted*).

The standard for invoking qualified immunity attempts to "accommodate competing social interests by ensuring that officials who knowingly violate the law are held accountable, while officials who reasonably exercise their discretion are protected." *Johnson-El v. Schoemehl,* 878 F.2d 1043, 1048 (8th Cir. 1989) *(quoting Warner v. Graham,* 845 F.2d 179, 182 (8th Cir. 1988)). As the United States Supreme Court has recognized "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he[/she] should be made to hesitate." *Harlow,* 457 U.S. at 819.

In the instant case, the Defendants argue that each of the Aldermen relied upon the report from Schraeder's investigation in deciding to terminate Belk's employment. However, the jury's verdict shows that they did not believe the Aldermens' testimony and that they believed that Belk's statements concerning Jim Link motivated their decisions. Accordingly, to date, Defendants have not shown that they are entitled to qualified immunity.

D. Alleged Errors in Rulings

The Defendants argue in their Motion that the Court erred in submitting to the jury the question of whether the election of Rayhart as City Clerk in April 1996, was retaliatory because Belk had no expectation of re-election. The premise of Defendants' argument is that Mo. Rev. Stat. § 79.320 grants the Aldermen the authority to elect the City Clerk of their choosing each year. Although the Aldermen could have chosen to not re-elect Belk for almost any reason, or no reason at all, the law does not permit them to not re-elect her for an improper reason, i.e., her exercise of her First Amendment rights. *See, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977). Based upon the evidence which demonstrated that Belk had been repeatedly appointed City Clerk from 1982 until 1996, and that there were no complaints regarding her job performance, the Court

properly submitted to the jury the question of whether the Aldermens' decision was motivated by retaliation for her allegations concerning the improper payment of benefits.

The Defendants also challenge the Court's allowance of Belk's testimony concerning the contents of a letter she allegedly sent the City Administrator, requesting a meeting with him in or about October 1996. Defendants' challenge is based upon the best evidence rule, Fed. R. Evid. 1002, and they argue that they were prejudiced by the testimony because Belk's counsel failed to confirm that the City Administrator received the letter and the testimony left the impression that Belk had properly gone through the chain of command prior to bringing her concerns to Alderman Dolby. The Court finds that the issue "is not closely related to a controlling issue," and therefore, its admission of the testimony was in compliance with Fed. R. Evid. 1004(4).

IV. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Defendants' Motion for Judgment as a Matter of Law, or in the Alternative, New Trial [Doc. # 76] is DENIED.

/s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: September 21, 1999
Kansas City, Missouri

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-3911WMJC

LAVERNE BELK,

Appellee,

vs.

CITY OF ELDON; SCOTT HARRISON;
STEVE WOOD; BRAD VEACH; RON BLY,

Appellants.

Order Denying Petition for Rehearing and
for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judges Bowman and Loken would grant the petition.

(5128-010199)

November 21, 2000

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF MISSOURI

[Filed Nov 25, 1998]

Case Number: 97-4174-CV-C-5

LAVERNE BELK

v.

CITY OF ELDON, *et al.*,

X Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

By jury verdict of November 23, 1998, on the sex discrimination claim of plaintiff LaVerne Belk, the jury finds in favor of the defendants. On the First Amendment retaliation claim of plaintiff LaVerne Belk, the jury finds in favor of the plaintiff. The jury finds plaintiff LaVerne Belk's lost wages through the date of this verdict to be: $60,000 The jury finds plaintiff LaVerne Belk's future lost wages to be $310,000. The jury finds plaintiff's other damages, excluding past and future lost wages, to be $80,000.

ENTERED ON: November 25, 1998

/s/ R.F. Connor
Clerk

Novermber 25, 1998

/s/ Ineligible
(by) Deputy Clerk

APPENDIX E

VERDICT

[Filed Nov 23, 1998]

QUESTION 1:

Note: Complete the following paragraph by writing in the name required by your verdict.

On the sex discrimination claim of plaintiff LaVerne Belk, as submitted in Instruction No. 13, we find in favor of

Defendant_____
(Plaintiff La Verne Belk) Or (Defendants)

Note: Answer the next question only if the above finding is in favor of plaintiff. If the above finding is in favor of defendants, go to Question 2.

Has it been proved by the greater weight of the evidence that defendants would have discharged plaintiff regardless of her sex?

_____ Yes _____ No

(Mark an "x" in the appropriate space.)

QUESTION 2:

Note: Complete the following paragraph by writing in the names required by your verdict.

On the First Amendment retaliation claim of plaintiff LaVerne Belk, as submitted in Instruction 15, we find in favor of

Plaintiff_____
(Plaintiff Laverne Belk) Or (Defendants)

DAMAGES:

Note: Complete the following paragraphs only if your answer to Question 1 and/or Question 2 is in favor of plaintiff If your findings to Question 1 and Question 2 are in favor of

the defendants(s), have your foreperson sign and date this form because you have completed your deliberations.

We find plaintiff LaLerne Belk's Lost wages through the date of this verdict to be:

$60,000 (stating the amount or, if none, write the word "none").

We find plaintiff La Verne Belk's future lost wages to be:

$310,000 (stating the amount or, if none, write the word "none").

We find the plaintiff's other damages, excluding past and future wages, to be:

$80,000 (stating the amount or if you find that plaintiff's damage do not have a monetary value, write in the nominal amount of One Dollar $1.00).

/s/ illegible
Foreperson

Dated 11/23/98

SUPPLEMENTAL VERDICT FORM

As directed in Instruction No. 18, we find as follows:

Question No. 1: Has it been proved by the greater weight of the evidence that La Verne Belk told Harold Dolby in October 1995 that a city employee was receiving benefits to which the employee was not entitled?

X Yes ____No

(Mark an "X" in the appropriate space

Question No. 2: Has it been proved by the greater weight of the evidence that plaintiff's statements to Harold Dolby in October 1995 impeded the efficient operation of the City of Eldon's government function?

___Yes X No

(Mark an "X" in the appropriate space

Question No. 3: Has it been proved by the greater weight of the evidence that plaintiff's attendance at Eldon Concerned Citizens Committee meetings impeded the efficient operation of the city of Eldon's governmental function?

___Yes X No

(Mark an "X" in the appropriate space

Question No. 3: Has it been proved by the greater weight of the evidence that LaVern Belk did not speak at the Eldon Concerned Citizens Committee meetings except to answer questions directed to her?

X Yes ____No

(Mark an "X" in the appropriate space

Question No. 4: Has it been proved by the greater weight of the evidence that La Verne Belk made statements at the Eldon Concerned Citizens Committee meetings which were critical of city administration or city personnel?

___Yes X No

(Mark an "X" in the appropriate space

APPENDIX F

INSTRUCTION NO. 15

Your verdict must be for plaintiff on plaintiffs First Amendment retaliation claim if the following elements have been proved by the greater weight of the evidence:

First, defendants did not elect plaintiff as City Clerk in April 1996 and discharged plaintiff in May 1996; and

Second, plaintiffs statements to Harold Dolby in October 1995 and attendance at meetings of the Eldon Concerned Citizens Committee were motivating factors in defendants' decisions.

However, your verdict must be for defendants if any of the above elements has not been proved by the greater weight of the evidence, or if it has been proved by the greater weight of the evidence that defendants would have discharged plaintiff and would not have elected her as City Clerk regardless of her statements to Harold Dolby in October 1995 and her attendance at the meetings of the Eldon Concerned Citizens Committee.

As used in this instruction, plaintiffs statements to Harold Dolby in October 1995 and attendance at meetings of the Eldon Concerned Citizens Committee were motivating factors if these actions played a part in defendants' decisions. However, plaintiffs statements to Harold Dolby in October 1995 and attendance at meetings of the Eldon Concerned Citizens Committee need not have been the only reason for defendants' decisions.

APPENDIX G

[Rejected]

Directions

The verdict in this case will be determined by your answers to a series of questions set forth below. Make sure that you read the questions carefully because they explain the order in which the questions should be answered and which questions may be skipped.

In Question No. 1, you will be asked whether plaintiff engaged in expression which addressed a matter of public concern. Expression involves a matter of public concern when it addresses a matter of political, social, or other concern to the community at large, but not when it involves only matters of personal concern. If it has been proved that plaintiff did engage in expression about a matter of public concern, you must answer "yes" to Question No. 1. If it has not been proved, you must answer "no" to Question No. 1.

In Question No. 2, if you answered "yes" to Question No. 1, you will be asked whether plaintiff's expression was a motivating factor in defendant's decision to discharge her. If it has been proved that plaintiff did engage in expression about a matter of public concern, and such expression was a motivating factor in the defendants' decision to discharge plaintiff, you must answer "yes" to Question No. 2. If it has not been proved, you must answer "no" to Question No. 2.

In Questions No. 3 and 4, if you answered "yes" to both Questions No. 1 and 2, you will be asked whether plaintiff's expression was a determining factor in defendants' decision to discharge her "Expression was a determining factor" only if defendants would not have discharged plaintiff but for the fact that she engaged in expression on matters of public concern. It does not require that expression was the only reason for the decision made by defendants. If it has been proved that plaintiff's expression was a determining factor in defendants' decision, you must answer "yes" to Question No.

3. If it has not been proved, you must answer "no" to Question No. 3. If it has been proved that the defendants would have discharged plaintiff regardless of whether she engaged in expression on matters of public concern, you must answer "yes" to Question No. 4. If it has not been proved, you must answer "no" to Question No. 4.

In Question No. 5, you will be asked whether personal loyalty, and confidence of superiors are necessary for one to perform the duties of plaintiff's job. If it has been proved that plaintiff's personal loyalty to her superiors, and their confidence in her were necessary for her to effectively perform the duties of her job, you must answer "yes" to Question No. 5. If it has not been proved, you must answer "no" to Question No. 5.

In Question No. 6. you will be asked whether plaintiff's conduct had a detrimental impact on working relationships between her and superiors. If it has been proved that plaintiff's conduct had a detrimental impact on working relationships between her and superiors, you must answer "yes" to Question No. 6. If it has not been proved, you must answer "no" to Question No. 6.

In Question No. 7. you will be asked whether plaintiff was insubordinate toward her supervisor, or engaged in acts which undermined the authority of her supervisor. If it has been proved that plaintiff's conduct either was insubordinate, or undermined the authority of her supervisor, you must answer "yes" to Question No. 7. If it has not been proved, you must answer "no" to Question No. 7.

In Question No. 8. you will be asked whether plaintiff's conduct impeded the efficient operation of the City of Eldon's governmental. function. If it has been proved that plaintiff's conduct impeded the efficient operation of the City of Eldon's governmental function, you must answer "yes" to Question No. 8. If it has not been proved, you must answer "no" to Question No. 8.

Question No. 9, deals with the amount of damages plaintiff is illegible to recover. In answering Question No. 9, you are instructed to assess plaintiff's damages in accordance with Instruction ___.

QUESTIONS

Question No. 1: Has it been proved by the greater weight of the evidence that plaintiff expressed her views on issues of public concern?

___Yes ___ No

Note: Continue on to Question No. 2 only if you answered "yes" to Question No. 1. If you answered "no" to Question No. 1, you need not answer any further questions. You should have your foreperson sign and date this form because you have completed your deliberation on this First Amendment claim.

Question No. 2: Has it been proved by the greater weight of the evidence that plaintiff's expression, on matters of public concern, was a motivating factor in defendant's decision to discharge her?

___Yes ___ No

Note: Continue on to Question No. 3 only if you answered "yes" to Question No. 2. If you answered "no" to Question No. 2, you need not answer any further questions. You should have your foreperson sign and date this form because you have completed your deliberation on this First Amendment claim.

Question No. 3: Has it been proved by the greater weight or preponderance of the evidence that plaintiff's expression on matters of public concern was a determining factor in defendants' decision to discharge her?

___Yes ___ No

Note: Continue on to Question No. 4 only if you answered *"no"* to Question No. 3. If you answered "yes" to Question No. 3, go directly to Question No. 5.

Question No. 4: (Answer this question if you answered "yes" to Question No. 1 and 2, and "no" to question No. 3.) Has it been proved by the greater weight of the evidence that defendants would have discharged plaintiff regardless of her expression on matters of public concern?

___Yes ___ No

Note: Continue on to Question No. 5 only if you answered "no" to Question No. 4. If you answered "yes" to Question No. 4, have your foreperson sign and date this form because you have completed your deliberation on this First Amendment claim.

Question No. 5: (Answer this question if you answered "yes" to Question No. 3, and "no" to Question No. 4.) Has it been proved by the greater weight of the evidence that personal loyalty, and confidence of superiors are necessary for one to perform the duties of plaintiff's job?

___Yes ___ No

Note: Continue on to Question No. 5 only if you answered "no" to Question No. 4. If you answered "yes" to Question No. 4, have your foreperson sign and date this form because you have completed your deliberation on this First Amendment claim.

Question No. 6: (Answer this question if you answered "yes" to Question No. 3, and "no" to Question No. 4, regardless of how you answered Question No. 5.) Has it been proved by the greater weight of the evidence that plaintiff's conduct had a detrimental impact on working relationships between her and superiors?

___Yes ___ No

Note: Continue on to Question No. 7 only if you answered "no" to Question No. 4. If you answered "yes" to Question No. 4, have your foreperson sign and date this form because you. have completed your deliberation on this First Amendment claim.

Question No. 7: (Answer this question if you answered "yes" to Question No. 3, and "no" to Question No. 4, regardless of how you answered any question after Question No. 4.) Has it been proved by the greater weight of the evidence that plaintiff was insubordinate toward her superiors, or engaged in acts which undermined the authority of her superiors?

___Yes ___ No

Note: Continue on to Question No. 8 only if you answered "no" to Question No. 4. If you answered "yes" to Question No. 4, have your foreperson sign and date this form because you have completed your deliberation on this First Amendment claim.

Question No. 8: (Answer this question if you answered "yes" to Question No. 3, and "no" to Question No. 4, regardless of how you answered any question after Question No. 4.) Has it been proved by the greater weight of the evidence that plaintiff's conduct impeded the efficient operation of the City of Eldon's governmental function?

___Yes ___ No

Note: Continue on to Question No. 9 only if you answered "no" to Question No. 4. If you answered "yes" to Question No. 4, have your foreperson sign and date this form because you have completed your deliberation on this First Amendment claim.

Question No. 9: (Answer this question if you answered "yes" to Question No. 3, and "no" to Question No. 4, regardless of how you answered any other questions following Question No. 4.) What is the amount of plaintiff's damages, as that term is defined in Instruction _____? $_____(stating the amount or, if you find that plaintiff's damages have no monetary value, write in the nominal amount of One Dollar ($1.00)).

Model 8th Circuit Civil Jury Instruction

No. 5.92, modified, *Barnard v. Jackson County*, 43 F.3d 1218 (8th Cir. 1995); *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684 (1983); *Shands v. City of Kennet*, 993 F.2d 1337 (8th Cir. 1993).

Submitted by: Plaintiff _____

Defendants XXXXX

Jointly _____

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Case No. 97-4174-CV-C-5

Jefferson City, Missouri
November 16, 1998

LAVERNE BELK,

Plaintiff,

v.

CITY OF ELDON, *et al.*,

Defendants.

VOLUME I
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE NANETTE K. LAUGHREY
UNITED STATES DISTRICT JUDGE and a JURY

[II-223]

* * * *

Belk-Cross

Q. —read it for accuracy, and sign it to acknowledge its accuracy, correct?

A. Yes.

Q. You previously talked about things that. Mr. Link has done to you and you talked about two decisions that the Eldon Board of Aldermen made. One, to make Betty Rayhart municipal clerk in April of 1996, and one to terminate your and Mr. Link's positions in May of 1996, correct?

A. I spoke about the decisions they made directly concerning me, yes.

Q. Okay. Now, I want to ask you if it remains your testimony that you have no reason to believe that any of the Aldermen that are involved in this lawsuit had any personal animosity towards you.

A. Nothing that I know of.

Q. You have no reason to believe that as you sit here in the courtroom today, do you?

A. I have never done anything to them that I knew of.

Q. Well, that wasn't quite my question.

A. —that would create the animosity.

Q. My question is, you have no reason to believe that they had any animosity to you, do you?

A. That's correct.

Q. Now, did you also tell us earlier that you felt that the

[II-224] Board of Aldermen in making the decision to terminate you did that as strictly dealing with a conflict between you and Mr. Link?

A. Yes, I believe so.

Q. That'd be your testimony again today, wouldn't it?

A. That was my thought at the time, yes.

Q. Now, I want to talk a little bit about documents that relate to things that you talked with Mr. Dolby about. Okay?

A. Okay.

Q. Now, first of all, there are no documents regarding the issue of the allegations that Mr. Link was having an extra-marital affair, is that correct?

A. I don't know that anyone ever allegated an affair. Everyone just questioned the relationship between them.

Q. What did you tell Mr. Dolby?

A. That very thing, that a lot of people had come to me saying that they had seen them in the city parks, and wanted to know what was going on there, and things like that. I don't think the word "affair" was ever entered into it.

Q. So it was inappropriate then to just meet another employee at a city park or something, is that what you're telling us?

A. No, that's not what I'm saying at all. I'm saying people that had observed them came to me and asked me what was their relationship and what was going on there.

* * * *

Belk-Cross

[II-233] Q. And you knew at the time that you were doing that that one of the primary goals of that organization was to get Link fired, didn't you?

A. I don't know that that was one of their primary goals, as much as settling issues that Mr. Link had not been able to settle with them.

Q. Let me hand you your deposition, and direct your attention to page 75 of it. You've seen that document before, I gather, haven't you?

A. Page what?

Q. 75. Why don't you direct your attention to a question I asked you beginning on line 9, and then finish at about line 17. Actually line 21.

A. Begin where?

Q. Line 9 to line 21, Ms. Belk.

A. Question, "And when did you come to understand that the removal of Mr. Link as City Administrator was going to be objectives of this citizens organization?"

Q. Yes. And your answer was?

A. "Well, it had been some peoples' agenda for years."

Q. And the next question was, "When did it become an objective of this citizens organization, if you know?"

A. And the answer was, "It was as much an objective as any

Belk Cross

[II-234] of the other subjects were, I think."

Q. "And you became aware of that at the first meeting you attended sometime between April 9, 1996, and May 8, 1996, correct?"

A. "That's right."

Q. So you were participating in the organizational activities of an organization that had one of its objectives to get your boss fired, weren't you?

A. I wasn't participating in the organization. I was only giving them direction as they asked for it on how to form a committee.

Q. In fact, one of the people who formed that's named JoAnn Jones, correct?

A. Yes.

Q. And she even asked you for some assistance as to how to run a meeting, didn't she?

A. She asked me about Roberts Rules of order, yes.

Q. Did you have anything to do with organizing a picket at city hall?

A. No, I did not.

Q. Your daughters participated in that, didn't they?

A. Yes, they did.

Q. But you had no organizational activities in that whatsoever?

A. No.

Belk-Cross

[II-235] Q. Okay.

A. I was at the meeting that they talked about it.

Q. Just a couple more things I want to ask you, I think. Oh, you said a little bit earlier, when Ms. Holste was questioning you this morning, that there was a memo that you wrote to Mr. Link sometime in the late summer or fall of 1995, questioning the benefits that Ms. Carpenter was getting, correct?

A. No, I stated I had sent Mr. Link a memo with some concerns that I had.

Q. Where is that memo today? Did you keep a copy?

A. I have a copy in my computer.

Q. You don't—haven't furnished a copy yet in this case though, is that correct?

A. No, I don't think so.

Q. But you're telling us you provided a copy of that to Mr. Link?

A. I provided a copy to Mr. Link and to Mr. Ivan Schrader.

Q. What concerns was it that you expressed in this memorandum?

A. The concerns were the productivity of City Hall, and the problems that were arising out of my duty to perform, when I wasn't allowed to supervise the work that was being done by Mrs. Carpenter. And that I addressed the fact that he had told me I had better solve the problem, and I could not solve [II-236] the problem that he had created without him allowing me to. I also stated in the letter that I had concerns of a more personal nature, but would only speak to him in person about that.

Q. So the memo didn't say anything about Ms. Carpenter's benefits?

A. No.

Q. And it didn't say anything about these accusations, are the something more than professional relationship between those two?

A. Not directly. That was my personal concerns, and I wanted to talk with him in person about it.

Q. Could you walk up to Mr. Link and ask him those things?

A. Today?

Q. Could you have then?

A. Well, I would have thought I could. We always had an open communication relationship.

Q. And why didn't you just walk up to him and tell him that?

A. Because I didn't want to do it at City Hall, and I stated that in that memo.

Q. Thank you. Can I have that back, please?

MR. BERRY: No further questions, Your Honor.

* * * *

Dolby-Direct

[II-245] Q. Do you recall whether Ms. Belk said anything to you about employment benefits that Ms. Carpenter was receiving, and having concerns about those?

A. No, I don't really remember that, no.

Q. Okay. Do you recall that she did not say that to you?

MR. BERRY: Object. That calls for the witness to speculate.

THE COURT: I'll overrule the objection.

THE WITNESS: I honestly don't remember anything about any benefits being brought up at that meeting. The only thing that I remember was basically more of a sexual—had sexual overtones to it than it did benefits or anything specific.

BY MS. HOLSTE:

Q. Okay. But you just don't recall?

A. Right.

Q. Okay. Did Laverne ask you to take any specific action on what she was telling you?

A. No, she asked that I not talk with the city attorney or the mayor.

Q. Did she tell you why she didn't want you talking to them?

A. Because they were personal friends of Mr. Link.

Q. What did you do after you had this conversation with Laverne Belk?

A. Nothing immediately, then after weighing the allega-

* * *

* * * *

Willis-Cross

[II-280] Q. What did that have to do with hunting for staples?

A. Nothing. I was curious.

Q. Why—

A. I was curious.

Q. Now, wait a second. You were at Ms. Carpenter's desk?

A. Yes.

Q. And you open up her desk?

A. Yes.

Q. Had you found your staples yet?

A. No.

Q. Did you ever find any staples there?

A. No.

Q. Okay. But you found a manila envelope with the name "Deb's" on it, right?

A. Right.

Q. And you looked through it because you were curious

A. Yes.

Q. Now, what all did you find in there?

A. I found a card.

Q. Anything else?

A. Not that time, no.

Q. You went through on other occasions?

A. I looked in it one other time.

Q. Well, tell us about what you found with the card.

Willis-Cross

[II-281] A. I found an unsigned card with no name "To" who it was to.

Q. Um-hum. Did it have a name as to who it was from?

A. No. It was unsigned.

Q. Did it have a message written on it?

A. It had printed—you know, it was a preprinted card, and it had some sweet little saying, I couldn't recall what it said, and there was a handwritten note on it.

Q. When you say "on it," was this inscribed on the card itself, or inscribed on a piece of paper with the card?

A. It was on the card itself.

Q. And the handwritten note was in whose writing, if you know?

A. I wasn't sure whose writing it was.

Q. And what did you do with this card then?

A. I made a copy of it.

Q. Why?

A. At this time, I was still, in my mind, with all the stories that was going on around town, and all the things that people was coming and implying to me, I was—in my mind, they're not having any kind of relationship other than the working relationship that they was supposedly having.

Q. Okay.

A. This saying was not really like love, love, you know, but it was a mushy note, and the handwritten part was mushy, also. It was something that I did not feel—I didn't think

[II-282] it was her husband had—her husband had sent it to her. And because of all the stories, I made a copy of it.

Q. And what did you do with that copy?

A. I went and gave it to Laverne Belk.

Q. Now, what did Ms. Belk have to do with any of this?

A. Since I found it in Debra's desk, and I felt that, you know, I could have done several things with it, I guess, but she was my supervisor, so I took it to her.

Q. Now, Ms. Carpenter was supervised by Mr. Link, correct?

A. Well, I understood that she was—well, yeah, at that —no, but at that time I think Laverne Belk was still supervising her.

Q. What time of year was this?

A. Oh, man. I couldn't remember when that was. It was before April 9th, '96. It was before court was changed from seven o'clock to five o'clock.

Q. That doesn't help me much. Can you tell us when that happened?

A. I know. I'm sorry. I'm just I'm trying to—and I just—I couldn't tell you exactly when it was.

Q. Well, give us a ballpark figure.

A. Well, that's what I'm trying to do. I have no idea when I did it. I can't remember the time. It was during—okay. Well, she came in January, February. Oh, I just can't remember exactly when it was.

* * * *

Willis-Cross

[II-283] Q. Okay.

A. I know it was before she quit talking to me completely. I knew before—it was while we were still friendly.

Q. And you were friends when you did this?

A. Yes.

Q. Okay. Tell me about the next time you went through her desk. This gets better. I didn't know there was a second one.

A. It was just the next court night.

Q. What were you looking for that time?

A. This is—

MS. HOLSTE: Well, I'm going to object to the relevance of this.

THE COURT: I'm going to overrule the objection.

BY MR. BERRY:

Q. What were you looking for the next time that you went through Ms. Carpenter's desk?

A. I wasn't for anything specific. The next time I went through her desk, I went straight to the envelope.

Q. Were you looking for staples again?

A. No.

Q. Oh, you were looking for papers in her desk?

A. No.

Q. What were you looking for?

A: To see if there was anything else added into that manila [II-284] envelope.

Q. Evidence of what?

MS. HOLSTE: I'm going to object.

THE COURT: I'm going to overrule the objection.

THE WITNESS: Basically, when I went the second time, I wanted to believe that it wasn't true, that there was anything but a relationship.

BY MR. BERRY:

Q. And you didn't find anything the next time?

A. Well, I found other stuff in the envelope, yes.

Q. What did you find?

A. I found a computer printout.

Q. Okay. Did you make a copy of that?

A. Yes, I did.

Q. What was it a printout of?

A. It was three words.

Q. And it said?

A. I love you.

Q. And do you know who it was directed to?

A. No.

Q. And what did you do with that copy?

A. Gave it to Laverne Belk.

Q. Did Ms. Belk ask you to do any of this?

A. No, she did not.

Q. Did it on your own?

Willis-Cross

[II-285] A. Yes, I did.

Q. And did she say I don't approve of you going through other people's desks?

A. No.

Q. Did she indicate that that's not the way we conduct business in this City Hall at any time, Ms. Willis? Or did she approve of it?

A. She didn't say one way or the other.

Q. But she took it?

A. Yes, she did.

Q. Thank you.

* * * *

Bly-Direct

[III-397] Q. What generally in the way of information did Ms. Belk convey to you?

A. She had her evaluations from the past with her. She had the disciplinary action forms with her that Mr. Link had written up on her.

Q. And had you seen those before that, those disciplinary action forms?

A. Yes. I've got copies of them from Mr. Link before the—

Q. What did you do with those copies that Mr. Link sent you?

A. I threw them in the trash.

Q. Why?

A. I weighed them zero.

Q. How come?

A. There was—I felt like there was a feud going on at City Hall and he was nitpicking, I guess, with his—with his disciplinary action forms that he was writing up on her.

Q. Did Ms. Belk make any statements to you about running the City?

A. I asked Mrs. Belk if she wanted to become the City Administrator.

Q. Was she eligible to become the City Administrator?

A. No.

Q. Why?

A. She lived out of the city limits.

* * * *

Schraeder-Direct

[III-465] Q. Did your report include a recommendation that the City Administrator, Mr. James Link, and that the City—Assistant City Administrator or former City Clerk, I can't remember how you characterized Ms. Belk's position at the time, both be terminated as employees of the City?

A. That was one of the options.

Q. And during the telephone conversation you had with the Board of Aldermen, was that a recommendation that you specifically discussed with them?

A. Yes, and I believe that that was an option that I found to be preferable.

Q. Were there litigation consequences potentially that you discussed with the Board of Aldermen?

A. Yes.

Q. Was one of those litigation consequences liability to Mr. Link if his contract was terminated prematurely?

A. That was a significant consideration as to Mr. Link.

Q. And were there litigation consequences considered with regard to Ms. Belk?

A. Limited because she was an at-will employee which meant that the City was free to remove her from her job for no reason or any reason. So, that's significant difference between the potential exposures.

Q. Why did you consider the recommendation to remove both of [III-466] these two people the preferable option?

A. My investigation showed that the—literally the City employees had divided up sides and were supporting one

position or the other. It was my view, after the investigation, that whichever side succeeded if they were still there, that the problems that existed in the City would interfere with and continue to expand to interfere with City's work and it was not a good situation for the City to be involved in.

MR. BERRY: Thank you. Nothing further.

A. No, I don't. He was the first one I interviewed because he was a senior manager in the City at the time I conducted the investigation.

Q. Okay. Do you recall whether it had been more than an hour or—

Belk-Cross

CROSS-EXAMINATION

BY MR. BERRY:

Q. Ms. Belk, you recall being in my office a number of months ago and giving your deposition, don't you?

A. I was somewhere. I don't know whose office I was in.

Q. Okay. Do you have a recollection of when we talked about what you supposedly told Mr. Dolby, you referred to the employees as being temporary employees?

A. Yes.

Q. And you referred to Ms. Carpenter as being a temporary employee, didn't you?

A. Yes.

Belk-Cross

[III-499] Q. And, in fact, Ms. Carpenter was not a temporary employee. She was a permanent employee on a part-time scheduled basis, correct?

A. That's what was shown here yesterday.

Q. Well, do you have any reason to believe that wasn't true?

A. No, I don't have any reason to believe that that piece of paper is not a true and accurate copy.

Q. But what about these other temporaries. She's not the same thing. She isn't a temporary, is she? At the time we're talking about.

A. At the time that you're talking about, apparently not. It was my—had always been my understanding that she was a temporary.

Q. But you'd filled the forms out.

A. I put her—

Q. Do you want to look at the writing?

A. I did look at the writing and I don't believe it's my writing.

Q. You don't think it's your handwriting beneath your signature.

MS. HOLSTE: Your Honor, that mischaracterizes the document—

THE WITNESS: My signature is not on that form.

MS. HOLSTE: —itself.

MR. BERRY: All right. Your signature—

Belk-Cross

[III-500] THE COURT: Just a minute, please. Refer to the document number so we don't get them confused.

MR. BERRY: Very well.

BY MR. BERRY:

Q. Let's go to this. Ms. Willis was classified as a permanent part-time employee as well, correct?

A. Yes.

Q. And within about three months of becoming one of those, she got insurance benefits just like Ms. Carpenter did a few years later, correct?

A. If I recall in actuality about three months after Mrs. Willis went to work there, she went full time because she took on the cemetery clerk duties, too.

Q. Was she reclassified to your knowledge?

A. I don't know if there was an additional part-time permanent personnel action request, or if there was a separate

personnel action request that said she was also the—that she was now the court clerk and cemetery clerk working full time.

Q. The point is those two people were treated the same, weren't they?

A. I have no idea what you mean.

Q. Ms. Belk, I direct your attention to page—let me give you your deposition before I attempt to do that—page 58—

A. Okay.

Belk-Cross

[III-501] Q. —of it.

A. Okay.

Q. I want you to focus on page—on line 25 and then to the next page on line 1. It's very brief. Let me just ask you the question. Now, at the time that Ms. Rayhart was elected City Clerk, there was no such thing as the Eldon Concerned Citizens was there?

A. I wasn't aware of it, but that doesn't mean it didn't exist.

Q. Well, let's look at page 58 and line 25 and I'll read you this question and see if you recall the answer you gave when we talked about this in January 21 of this year, several months ago. Questions, "The committee formed after April 9, 1996." And your answer on the top of page 59 was?

A. "Yes."

Q. Thank you.

MR. BERRY: Nothing further, Your Honor.

* * * *

Belk-Direct

* * * *

Q. How would you describe your working relationship with Jim Link when he first began?

A. It was very open, open communication. As with any city administrator, you kind of go backwards for a period of time while they get themselves brought up to speed. So that

part was not unusual as any other city administrator that had come there. But he expressed a strong desire to get himself up to speed as fast as possible. We had no problems working together. If I had an issue, or he had an issue, we were able to sit down and talk it out and communicate, and no problem for several years.

Q. Did you have any resentment towards him at all?

A. No.

Q. And what position did you have when Mr. Link was hired as City Administrator?

A. Administrative Assistant, City Clerk, and Systems Administrator.

Q. And what were you basic job duties of each of those positions?

A. As Administrative Assistant, I was department head over the administration department, and put all the fiscal reports together, worked with the auditors, reconciled the monthly reports, and the bank statements, and the collector's re

Belk-Direct

[II-143] ports, and also supervised the payroll, the tax billing, the utility billing, all of that. Took care of accounts payable. Supervised the fiscal side of the court. And as Systems Administrator, I was responsible for keeping the computer system going, training on any new programs, and training the rest of the employees. As City Clerk, I was responsible for attending all of the Board of Aldermen meetings, preparing the minutes, maintaining the records of the City.

Q. Would it be fair to state you pretty much knew the operation of the City?

A. Yes.

Q. Okay. Did you then—you supervised individuals who worked within the Department of Administration?

A. Yes.

Q. Okay. After Jim Link was hired on, were there other people who were hired to work within the Department of Administration? Perhaps maybe to replace others?

A. Yes.

Q. And do you recall approximately how many people you were supervising at that time?

A. Seven or eight.

Q. Of those seven or eight people, how many had you specifically encouraged and told to apply for the job that they held?

A. I never encouraged anyone, and I only told one person

* * * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Case No. 97-4174-CV-C-5

LAVERNE BELK,

Plaintiff,

vs.

CITY OF Eldon, *et al.*,

Defendants.

January 21, 1998
Jefferson City, Missouri

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* * * *

DEPOSITION OF LAVERN BELK

[46] Q What were your two titles?

A. City Clerk and Administrative Assistant.

Q. The Administrative Assistant to who?

A. To the City Administrator.

Q. Were your duties as City Clerk any different than your duties as Mr. Millard's Administrative Assistant in his capacity as the City Administrator?

A. Somewhat, yes.

Q. Tell me about that, would you please.

A. When he had special projects that he needed assistance on, I took care of whatever he needed done, whether it was research or attending a meeting for him, or

that sort of thing. It was totally separate from the financial duties and administrative—or administration supervision.

* * * *

[53] Q. And do you know why that was? Was there a close personal relationship, or was Ms. Link—Ms. Carpenter doing—work on the side for Mr. Link or something of that sort?

A. There was a relationship building, but I—I really don't know whether she was doing any work on the side for him or not.

Q. When you say "relationship building," what are you getting at?

A. Well, there were a lot of closed-door lunches in his office—

Q. Okay.

A. —for starters.

Q. What else?

A. There was—any time anyone—if anyone said anything that she didn't like, she went straight to him, and they were reprimanded.

Q. Did that ever include you?

A. Yes.

Q. Okay. What else did you speak to Mr. Dolby about?

A. I told him that several people had told me that they had seen Mrs. Carpenter and.Mr. Link in the city parks together and that it was a joke on the business district that the City had hired him a [54] girlfriend, and that I felt that the City was going to be placed in a very precarious position if somebody didn't sit up and take notice, but that my biggest concern was the fact that he was leaving the City open for all of these other temporaries to come back on the City for him giving one benefits when he wasn't giving the others.

Supreme Court, U.S.
FILED

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No. 00-1340

In The

Supreme Court of the United States

CITY OF ELDON, MISSOURI
RON BLY, STEVE WOOD, BRAD VEATCH, and
SCOTT HARRISON,

Petitioners,

v.

LAVERNE BELK,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Laverne Belk, respectfully requests that the court deny the Petition for Writ of Certiorari (hereinafter "Petition") seeking review of the decision of the Eighth Circuit Court of Appeals.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for a Writ of Certiorari for the following reasons: 1) the Eighth Circuit Court of Appeals correctly analyzed the issue of whether the employee's First Amendment rights outweighed the governmental employer's need for efficiency and harmony within the workplace and there is no conflict between the decision and ***Connick v. Myers,*** 461 U.S. 138 (1983); 2) the special interrogatories presented to the jury did not prevent the jury from deciding all necessary fact issues; and 3) the Court properly ruled that the individual defendants were not entitled to qualified immunity in light of the fact that none of them presented any evidence that the employee's First Amendment expression caused any disruption within the workplace, thereby obviating any real need for an in-depth analysis under ***Pickering v. Board of Education,*** 391 U.S. 563 (1968).

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS DOES NOT CONTRADICT THIS COURT'S RULING IN *CONNICK* IN THAT THE COURT CONSIDERED ALL OF THE EVIDENCE PRESENTED BY THE EMPLOYER AND FOUND THAT THE EMPLOYER COULD NOT SATISFY ITS BURDEN UNDER THE *PICKERING* BALANCING ANALYSIS AND, THUS, AN IN-DEPTH DISCUSSION OF THAT ANALYSIS WAS UNNECESSARY.

Petitioners assert that the Eighth Circuit Court of Appeals departed from this Court's decision in ***Connick*** by holding that the ***Pickering*** analysis was completely inapplicable unless the governmental employer first demonstrated actual workplace disruption caused by the employee's First Amendment expression. Petitioners' characterization of the court's ruling is not accurate.

The Eighth Circuit Court of Appeals, after having found that Respondent's speech touched upon a matter of public concern, then discussed whether the government's actions in terminating Respondent were improper, utilizing the ***Pickering*** balancing analysis. ***Belk v. City of Eldon,*** Pet.App.10a[1]. In so doing, the Court set forth the following interrelated six factors which have developed from ***Pickering*** and its progeny: "(1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working

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[1] Citation to "Pet.App." references the appendix to Petitioners' petition for writ of certiorari. For convenience, all page citations to the decision under review refer to the copy reproduced by Petitioners in the appendix to their petition, not to the pages of the reported opinion.

relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties." ***Belk,*** Pet.App.10a.

The Court then held that, in those few cases in which an employer cannot demonstrate that the employee's speech caused any actual disruption within the work-place, "[t]he court need not proceed to a specific ***Pickering*** factor analysis absent exceptional circumstances." ***Belk,*** Pet.App.11a. In other words, the Court was merely stating that, if it is clear that the government's evidence of work place disruption is weak and the employee's evidence demonstrates that there was substantial public interest in the employee's speech, which was expressed in a manner, time and place designed to minimize the work place disruption, the need for a discussion of each specific factor under the ***Pickering*** balancing test is obviated.

This Court, in both ***Pickering*** and ***Connick,*** wisely recognized that there can be no bright-line test to determine whether the government's interests outweigh the employee's interest in First Amendment retaliation cases. In ***Pickering,*** this Court stated, "[b]ecause of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." ***Pickering,*** 391 U.S. at 569. The

Court reiterated that comment in ***Connick***, and further stated, "[t]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." ***Connick***, 461 U.S. at 150.

The Eighth Circuit did not ignore or refuse to analyze this case under the recognized balancing test. Rather, the Court merely stated that, when the employer has failed to make a strong showing on the relevant factors, there is no need to address each specific factor individually in the analysis.

Petitioners further contend that the Eight Circuit Court's decision directly contradicts this Court's ruling in ***Waters v. Churchill***, 511 U.S. 661 (1994). In ***Waters***, this Court noted that because of their unique positions, public employees would need First Amendment protection in order that they might speak out about their knowledge of problems besetting the particular agencies for which they work. ***Waters***, 511 U.S. at 674. In those situations, this Court stated that, "the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." ***Id.*** Because this Court recognized that, in certain situations the need for First Amendment protection is greater and requires more of the employer, the Eighth Circuit Court's decision in this case does not contradict the holding of ***Waters***. The Eighth Circuit Court analyzed the evidence presented by the Petitioners and found that, as a matter of law, the evidence would not weigh in their favor under the ***Pickering*** balancing test.

II. THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT MISAPPLY *CONNICK* AND THE CLAIM THAT THE DECISION HAS AN IMPACT UPON HOW FIRST AMENDMENT RETALIATION CASES ARE ANALYZED IS WITHOUT MERIT.

Petitioners contend that the decision in this case follows from an entire line of cases which created a direct conflict with *Connick*. The cases cited by Petitioners, however, do not create such a conflict and Petitioners are exaggerating the alleged impact of these cases upon First Amendment retaliation cases. Furthermore, Petitioners seem to ignore the fact that the district court set out an in-depth *Pickering* analysis of Respondent's First Amendment claim and affirmed the jury's verdict in favor of Respondent. Thus, Petitioners have not been deprived of a full, in-depth *Pickering* analysis. The Eighth Circuit Court of Appeals had the benefit of the district court's full analysis and, after reviewing the evidence, recognized that another in-depth, factor-by-factor analysis was unnecessary, in light of the weakness of Petitioners' evidence.

A. The Eighth Circuit correctly upheld the District Court's decision in refusing to submit particular special interrogatories to the jury.

Petitioners state that they are not challenging the District Court's broad discretion in submitting jury instructions. Yet, that is exactly what they are doing. Petitioners do not point to any cases, in the Eighth Circuit or any other circuit, which hold that the District Court is required to submit special interrogatories to the jury. In

this case, the District Court submitted five special interrogatories to the jury. Pet.App.44a-45a.

As the Eighth Circuit properly recognized, the District Court has broad discretion in ruling upon proffered jury instructions. Petitioners argue to this Court that the District Court's failure to submit more than the five special interrogatories was so prejudicial that the decision to affirm the District Court's ruling should be reversed. This argument, however, ignores that the determination as to whether speech is protected is a question of law, not fact. *Connick*, 461 U.S. at 148, n.7.

Petitioners contend that the error occurred when the District Court did not submit certain special interrogatories to the jury and that, this failure somehow established a departure from other cases involving the *Pickering* analysis, that this Court should reverse the decision. Throughout their petition, Petitioners argue that the Eighth Circuit's decision contradicts this Court's decisions in *Connick* and *Waters* and that certiorari should be granted to address this glaring contradiction. The most significant obstacle for Petitioners, in making this argument, is that this Court has never held that there are certain interrogatories which must be submitted to a jury in a First Amendment retaliation case. In fact, to do so would be a dramatic departure from this Court's previous recognition that there can be no general standard by which First Amendment retaliation cases are analyzed. In *Pickering*, this Court stated: "Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a

general standard against which all such statements may be judged." *Pickering,* 391 U.S. at 569. This Court reiterated this statement in *Connick.* Again, in *Waters* this Court recognized that there are no general tests "[t]o determine when a procedural safeguard is required by the First Amendment . . . what constitutes a compelling state interest . . . what categories of speech are so lacking in value that they fall outside the protection of the First Amendment . . . or many other matters. . . . " *Waters,* 511 U.S. at 671 (citations omitted).

Petitioners contend that this Court's suggestion in *Waters,* that the jury decide fact questions relevant to the *Pickering* analysis, be expanded to a pronouncement from this Court regarding specific jury instructions for all cases involving a First Amendment retaliation claim. This contention is unreasonable, if not outrageous. Petitioners' argument suggests that the judiciary cannot discern which fact issues should be submitted to a jury in a First Amendment case. Respondent trusts that this Court's earlier rulings in First Amendment cases will continue to guide the lower courts to properly submit questions of fact to the jury and the Eighth Circuit Court's ruling does not jeopardize such guidance.

This Court has previously noted that the First Amendment declares the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). Similarly, the Court recognized that "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Accordingly, this Court has consistently held that

when an individual speaks on matters involving a public concern, that speech occupies the "highest rung of the hierarchy of First Amendment values," and is "entitled to special protection." ***NAACP v. Claiborne Hardware Co.,*** 458 U.S. 886, 913 (1982); ***Carey v. Brown,*** 447 U.S. 455, 467 (1980).

This Court should not abandon these principles of protecting speech concerning matters of vital interest to the public simply to create a general test regarding what fact questions should be submitted to a jury so that litigation can be simplified for the parties. Unlike Petitioners, Respondent has confidence in our judiciary to utilize the broad discretion afforded to them to consider each individual case and formulate special interrogatories which fairly and adequately present the fact issues to the jury and leave the question of law for the court's determination. The Eighth Circuit Court's decision in this case does not erode the ***Pickering*** test and should not alarm this Court, as Petitioners suggest.

B. The Eighth Circuit Court reviewed all of the evidence under the proper standard of review and did not fail to consider the full context of the dispute which motivated the Board's decision.

In this portion of their petition, Petitioners focus primarily upon the Eighth Circuit Court's limited review of Respondent's freedom of association claim. Petitioners argue that Respondent's activities with a group of citizens, known as the Eldon Concerned Citizens, were such

that the Court's failure to more fully consider those activities was prejudicial. There are several reasons why Petitioners' argument is without merit.

Respondent presented two theories at trial as to how her First Amendment rights were violated by Petitioners. Respondent's primary claim was that she was discharged for speaking privately to a member of the Board of Aldermen about her concerns that the City Administrator was improperly allowing an employee to receive benefits to which she was not entitled. The Court correctly held that, since Respondent's speech involved the improper use of public funds, her speech was protected by the First Amendment. Pet.App.9a-10a. The Court then went on to hold that the government's interest did not outweigh Respondent's interest, inasmuch as the city made very little, if any, showing that Respondent's speech disrupted the operations of the city. Pet.App.12a-13a. Because the Court found that Petitioners violated Respondent's First Amendment rights by terminating her for her conversation with Alderman Dolby, then the need to further analyze Respondent's freedom of association claim does not exist as a violation of Respondent's constitutional rights has already been found.

In addition, the freedom of association claim is not as critical as Petitioners would have this Court believe because the jury found, in answering the special interrogatories, that Respondent's attendance at the meetings of the Eldon Concerned Citizens did not impede the efficient operations of the city, that Respondent did not speak at any of the meetings, except to answer questions directed to her and that the city failed to prove that Respondent was critical of the city administration at the

meetings of the Eldon Concerned Citizens. Pet.App. 44a-45a.

The evidence at trial was that the president of the Eldon Concerned Citizens asked Respondent and several members of the Board of Aldermen to attend meetings of the citizens' group. A.1.a.[2] Petitioners would lead this Court to believe that Respondent was integral to the formation of this group. The testimony at trial clearly showed, and the jury properly found, that Respondent did nothing more than answer a few questions about how to form a group A.2.a. The Eighth Circuit Court did not depart from this Court's prior decisions in either ***Connick*** or ***Waters*** by not considering the freedom of association claim in greater detail.

C. The Eighth Circuit Court did not misconstrue this Court's decision in *Harlow v. Fitzgerald* in its ruling on the individual Petitioners' claims of qualified immunity.

Respondent does not challenge Petitioners' statements that this Court has previously ruled that "government officials performing discretionary functions generally are shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald,*** 457 U.S. 800, 817-18 (1982). In this case, however, Respondent's First Amendment rights were clearly established and a reasonable

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[2] Citation to "A" references the appendix located at the end of this Brief in Opposition to Petition for Writ of Certiorari.

person would have known that, under the circumstances of this case, that discharging Respondent for exercising those rights would be unconstitutional.

In this portion of their argument, Petitioners raise the same argument they made to the Eighth Circuit Court – namely that because the investigating attorney found reasons to discharge Respondent that the individual members of the Board of Aldermen should be entitled to qualified immunity. Petitioners ignore a crucial fact when making this argument. The Eighth Circuit Court, however, did not overlook this fact and neither should this Court.

The crucial fact which Petitioners do not point out to this Court is that the investigating attorney testified that he was not aware of Respondent's conversation with Alderman Dolby in which she spoke about the city administrator's improper use of public funds. A.3.a-7.a. Thus, the investigating attorney did not have knowledge of the First Amendment claim which could be raised by Respondent should she be discharged. Without this crucial information, his recommendation to the Board of Aldermen cannot be used to shield the individual members of the Board from liability.

The Eighth Circuit further held that, in light of the employer's failure to produce any evidence that Respondent's speech impeded the operations of the city, then the individual members of the Board are not entitled to qualified immunity. Pet.App.14a. In other words, if the balancing to be done under the ***Pickering*** test is not difficult because of the lack of evidence weighing in the

employer's favor and the individual officials then discharge the employee for exercising her right to speak out on matters of public concern, those individuals are not entitled to qualified immunity. The Eighth Circuit Court's opinion in this case does not depart from this Court's prior holdings in other cases and the petition for certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

LAVERNE BELK, Plaintiff, v. CITY OF ELDON, et al., Defendants.	Case No. 97-4174-CV-C-5 Jefferson City, Missouri November 19, 1998

VOLUME II & III
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE NANETTE K. LAUGHREY
UNITED STATES DISTRICT JUDGE and a JURY

[II-320] Jones – Direct

* * *

A. I was on the council when we hired him.

Q. Okay. Are you also familiar with a group known as the Eldon Concerned Citizens Committee?

A. Yes.

Q. How do you know about that group?

A. I was one of them that formed it.

Q. Okay. Who all formed that group?

A. There was about, I'd say, ten to 15 people, and then it expanded into about 60.

Q. Okay. Was Laverne Belk a member of the organizing group?

A. No.

Q. Okay. Did you invite individuals who were aldermen and city employees to attend meetings of the Eldon –

A. Yes, I did.

Q. Okay. Who specifically did you invite?

A. We invited all the aldermens to attend.

Q. Did any of them attend the meetings?

A. Yes, they did.

Q. Who attended the meetings?

A. Ron Bly attended, and Steve Wood attended that I know of.

Q. Did you invite anyone else?

A. We invited Laverne Belk to the second meeting.

Q. Okay. And did she attend?

A. Yes, she did.

Q. What did you tell Laverne was going to happen at the [II-321] meeting?

A. We needed some advice. We had several people that was very unhappy with the City. And we needed to see how to form it. You know, like a president, vice president, and she give us the procedures.

Q. Okay.

A. And then she left.

Q. Okay. She just told you procedurally how to organize –

A. Yes.

Q. – yourself?

A. Yes.

Q. And that's it?

A. Yes.

Q. Did she ever suggest any agenda for the group?

A. Well, she told us how to do an agenda.

Q. Okay. But did she tell you what should be the agenda?

A. No.

Q. Okay. Were the aldermen asked questions at this meeting?

A. Yes, they were.

Q. Did they answer those questions?

A. Most of the time they did.

Q. Was Laverne ever elected as an officer?

A. No.

Q. Why did you and the others start this group?

A. Well, we were quite concerned what was going on in the

* * *

obtain from them what they thought would be appropriate for me to know based on why I was there.

Q. And so you don't recall necessarily how long you spent with any one particular employee?

A. No. I spent the time that I felt was adequate for me to find out the facts upon which I could make recommendations and for the – for those people I met with to provide me with the information they wanted me to have.

Q. Okay. Did you interview Laverne Belk?

A. Yes.

Q. Okay. Did she – during the interview did she indicate to you that she had had a conversation with Harold Dolby regarding allegations that she had about Mr. Link?

A. I don't remember specifics today in terms of what was told to me or not told to me. What I turned into the City as a report is the – are the facts that I felt were appropriate to make any recommendation.

Q. Okay. So, you don't recall that or not?

A. Today I don't recall that conversation. It may have occurred. I don't know.

Q. Okay. Do you recall that I took your deposition earlier in this matter?

A. Yes.

Q. And do you recall me asking you that particular question at deposition –

[III-468] A. No.

Q. – as to whether Laverne had told you about her statements to Harold Dolby?

A. I don't have any independent recollection today.

Q. Okay. Were you aware that there was some investigation conducted about allegations that Ms. Belk had made about Mr. Link?

A. I don't have any independent recollection today of details like that. Part of the reason I was brought in is that there was some allegations concerning the conduct of the City Administrator involving sexual harassment.

Q. Okay. And do you recall if that was in reference to any one specific employee?

A. Yes, I do.

Q. And do you remember the name of that employee?

A. The last name comes to mind, I believe, was Carpenter.

Q. I need to clarify my question with you again. When you say you don't recall if Laverne told you about a statement she made to Harold Dolby, are you saying that it's your recollection that that did not recall or you aren't recalling whether it was or not?

A. I don't recall the specific conversations I had with people during the investigations at this point in time. And as to the second question related to it, I don't recall you asking me that question.

[III-469] Q. Okay. With respect to your investigation, did you become aware that Laverne Belk had been removed from her position as Assistant City Administrator, or at least had had supervisory authority taken from her by Mr. Link?

A. Mr. Link had adjusted Ms. Belk's position during the period of time in which he was City Administrator. I don't remember the specific positions to which her title was changed, but I do know that he did adjust her job duties and responsibilities while he was City Administrator prior to the time I conducted the investigation.

Q. Okay. Do you recall whether you received any information as to whether a few weeks prior to that action being taken, whether Ms. Belk had had her conversation with Mr. Dolby?

A. I don't recall that information at all.

Q. Okay.

A. The conversation that you keep referring to with Mr. Dolby, I don't have any recall of that.

Q. Okay. And you have conduct – you've testified you've conducted a number of investigations –

A. Yes.

Q. – such as this, right?

A. Yes.

Q. Would it have been of concern to you in your investigation in this particular matter if you had known that prior to – just a few weeks prior to Laverne being removed, had her [III-470] supervisory power taken from her by Mr. Link, that she had made a statement to an alderman, member of the Board of Aldermen, about allegations concerning Mr. Link?

A. That's kind of a long question, counsel.

Q. Yes, it is.

A. I'm going to try to answer it briefly. Whether or not Ms. Belk had her position adjusted or whether or not she had a conversation with a councilman concerning the City Administrator, was not relevant to the questions that I was looking at, not directly relevant, because what I was looking at were allegations of sexual misconduct, potential – potentially engaged in City Hall, and that's what I was focusing my attention to. If there were other potential exposures for the City that arose during that period of time, it very definitely would have been relevant. But at the – if I had that information – again I'm not sure I had it, don't recall that I had it – it would have been weighed along with what else I had in terms of resolving. But my investigation was related to the allegations of potential sexual misconduct and liability on the part of the City for that alleged conduct.

Q. Okay. And what was – you've testified that your recommendation was that there were then problems at City Hall, right?

A. Yes.

Q. Okay. And how was that related to your investigation

* * *